FOR PUBLIC RELEASE

UNIVERSITY OF THE STATE OF NEW YORK
STATE EDUCATION DEPARTMENT
OFFICE OF SCHOOL PERSONNEL REVIEW AND ACCOUNTABILITY
TEACHER TENURE HEARING UNIT

----------X

In the Matter of the Charges Preferred By:

LONG BEACH CITY SCHOOL DISTRICT, Employer,

Charging Party,

OPINION and AWARD

v.

SED File No. 26,724

LISA WEITZMAN, Tenured Teacher,

Respondent,

Pursuant to NY State Education Law §3020-a.

----------X

BEFORE: Robert A. Grey, Esq., Hearing Officer

APPEARANCES:

For the Charging Party-Employer:
Ingerman Smith, LLP
Hauppauge, NY

By: Christopher M. Powers, Esq.
Steven A. Goodstadt, Esq.

For the Respondent-Tenured Teacher:
Stagg, Terenzi, Confusione & Wabnik, LLP
Garden City, NY

By: Debra L. Wabnik, Esq.
David R. Ehrlich, Esq.

INTRODUCTION

The parties to this proceeding are the LONG BEACH CITY SCHOOL DISTRICT ("District" or "employer") and LISA WEITZMAN ("Respondent", "Ms. Weitzman" or "employee"), a tenured teacher employed by the District.

Pursuant to New York State Education Law Section 3020-a ("3020-a"), the undersigned was appointed by the State Education Department ("SED") of the University of the State of New York as Hearing Officer to hear this matter and render a final and binding determination as to whether the charges preferred were based upon just cause, and if so, to determine what penalty or other action, if any, shall be taken by the District. The District seeks the penalty of dismissal. Respondent strenuously disputes all the charges and seeks to retain her employment and resume her career with the District. Respondent alleges that the charges are frivolous, and seeks payment of her attorneys' fees pursuant to 3020-a.

Both parties appeared by counsel at all stages of the proceedings, and were afforded full, fair, reasonable and ample opportunity to present and challenge evidence, subpoena, examine, and cross-examine witnesses, and state and argue their positions in prosecution/defense of the charges. The parties did so. The positions of the parties are in the record, including as set forth in their respective detailed, thorough and comprehensive post-hearing submissions.[1]

---

[1] As discussed below, *revised* post-hearing submissions became necessary because the transcript was unexpectedly and materially revised by the transcription vendor, without notice, and without description or explanation of revisions, *after* the close of the record, and *after* the parties had submitted their post-hearing briefs and supporting

The pre-hearing conference included significant motion practice, and was extended for good cause shown. Hearings were held on 29 dates between August 17, 2015 and May 22, 2017. Due to extraordinary circumstances beyond the control of the parties, evidence was accepted after one hundred twenty-five days of the filing of charges. T96-99. At Respondent's discretion, and upon timely request pursuant to 3020-a, the hearings were open to the public. Respondent was informed and reminded by the Hearing Officer in the presence of her counsel that she was not obligated to testify, has the right under 3020-a to not testify, and that no inference would be taken by the Hearing Officer based upon her decision to testify or not testify. T321, 2889-2990. Respondent voluntarily elected to testify.

The District sustained substantial damage to its facilities, including the District Office, from Hurricane a/k/a "Superstorm" Sandy in 2012. Consequently, after the first scheduled hearing date (held upon mutual agreement at the Hauppauge, NY, offices of the District's counsel), hearings were held variously at the District's Lindell Elementary School, and the District's Nike facility, until the new District Office became available for the remainder of the hearings.

All testimony was received into the record under oath or affirmation, in-person, under direct observation of this Hearing Officer. Upon prior mutual agreement of the parties, one witness testified under observation by electronic audio-visual means while

---

authorities. The vendor's unexpected and unilateral action necessitated that the parties be given ample opportunity to review the revised transcript, and, accordingly, to provide revised post-hearing submissions. The parties did so. The vendor's unexpected and unilateral action caused extensive and unavoidable delay.

physically located in [redacted] Massachusetts.

SED's transcription service vendor created audio recordings of the hearings, which the vendor subsequently transcribed. The transcripts were made available solely as digital files in PDF format, available via download from SED's TEACH website.[2] The parties were given ample opportunity to review the transcripts and prepare their post-hearing submissions. After post-hearing submissions, the record was closed. However, as noted above, *revised* post-hearing submissions became necessary because the transcript was unexpectedly and materially revised by the transcription vendor, without notice, and without description or explanation of the revisions. The vendor's revisions to the transcript occurred *after* the close of the record. The vendor's unexpected and unilateral action necessitated extensive and time-consuming inquiry by the Hearing Officer to determine what changes the vendor made to the closed record, and why. The vendor eventually provided this information, and eventually issued a materially revised and expanded transcript. Thereupon, as required for due process and fundamental fairness, the Hearing Officer gave the parties ample opportunity to review the vendor's *materially revised* transcript, and, accordingly, to *revise* their post-hearing submissions. The parties did so, expending substantial extra time and effort. The vendor's unexpected and unilateral action also nullified the substantial blocks of time specifically allocated to this matter by the Hearing Officer for review of the

[2] Transcript page number citations are prefixed with "T". Transcript and Exhibit citations are intended as illustrative, and not necessarily all-inclusive, of the record evidence pertaining to the Hearing Officer's statements herein.

voluminous hearing record, deliberation thereon, and the timely rendering of this Opinion and Award.

The hearing record includes testimony from 36 witnesses (District - 13 witnesses; Respondent - 23 witnesses); the *revised* transcript consisting of in excess of 5,500 pages; and approximately 146 admitted exhibits (District - 36 exhibits; Respondent - 108 exhibits; Joint - 2 exhibits), exclusive of Hearing Officer exhibits. The District submitted a 116-page revised post-hearing brief, and Respondent submitted a 141-page revised post-hearing brief. Additionally, the District submitted a total of 25 court and 3020-a decisions.[3] Respondent submitted a total of 32 court and 3020-a decisions.

This Opinion and Award is based upon detailed and thorough review and analysis of the entire record, including the Hearing Officer's assessment of witness credibility, conflicting testimony, and the relative probative weight of all evidence in the record. All testimony, exhibits, party positions, motions, applications and post-hearing submissions were fully considered by the Hearing Officer in rendering this Opinion and Award, whether or not specifically addressed herein.[4]

POST-HEARING PROCEDURAL OBJECTIONS

Respondent raised post-hearing procedural objections, decision on which was

---

[3] One (1) of which was disregarded. See *Post-Hearing Procedural Objections* section, below.

[4] Respondent's post-hearing procedural objections to the District's post-hearing submissions are discussed immediately below.

reserved for this Opinion and Award. They are discussed now.

First, Respondent correctly objects to references to "District Exhibit 16" in the District's post-hearing brief. The document was marked for identification (T1430) but never admitted into evidence as an exhibit. Therefore, District Exhibit 16 is not in the record and should not have been referred to in the District's post-hearing brief. Said document has not been considered or relied upon by the Hearing Officer.

Second, Respondent objects to the District's inclusion of the *In re Card* case in the District's post-hearing submissions. The parties dispute the nature and impact of the *Card* case, and that of its appellate history. The *Card* case has not been considered or relied upon by the Hearing Officer.

Third, Respondent objects to the District's references to Notices of Claim and/or lawsuits in the District's post-hearing brief. The District correctly responds that Respondent's counsel, as well as some witnesses, referred to same, on the record, in this hearing. For example, T2160, 2285, 5007, 5034-5035. The Hearing Officer notes that a 3020-a proceeding is an independent *de novo* due process hearing. The referenced Notices of Claim and/or lawsuits have no bearing on determination of the 3020-a charges before this Hearing Officer, except that such matters, to the extent which they are in the hearing record, may warrant consideration in assessing the credibility of witness testimony.[5]

---

[5] Likewise regarding the "anonymous letter" that counsel and some witnesses referred to, on the record, in this hearing. Neither the details of the "anonymous letter", nor the details of any such Notices of Claim and/or lawsuits, are part of this hearing record.

The Hearing Officer does not find bad faith by either party in connection with these procedural matters.

The District's Statement of Charges specifies that: "*FOURTH: There exists just cause for discipline in that Respondent, LISA WEITZMAN, engaged in acts constituting misconduct, incompetency, neglect of duty and/or conduct unbecoming a teacher as follows:*". Eight (8) specific charges follow paragraph FOURTH. Hearing Officer Exhibit 2. Consistent with the applicable burden of proof – preponderance of the evidence, and based upon the aforesaid detailed and thorough review and analysis of the entire record, including assessment of witness credibility, conflicting testimony, and the relative probative weight of all evidence in the record, the Hearing Officer makes the following findings of fact, and conclusions, in general, followed by findings of fact, and conclusions, in separate sections for each of the eight (8) charges.

FINDINGS OF FACT, AND CONCLUSIONS, IN GENERAL

Respondent is a tenured teacher who at all relevant times herein was assigned as the special education teacher in the District's Long Beach Middle School ("LBMS") Bridge Program a/k/a the Autism Spectrum Disorder ("ASD") class. Respondent served in this capacity from the time she was hired in or about August 2007, until removed from classroom teaching duties and reassigned on or about November 18, 2014, in response to the allegations which led to Charge 1 herein.[6] Respondent's supervisor,

[6] The charges are not numbered in the Statement of Charges. In its Bill of Particulars, the District unofficially numbered the charges. For clarity and consistency, the same charge numbers are used in this Opinion and Award.

Vincent Russo, LBMS Special Education Coordinator, hired her for this position and considered her an effective teacher. Russo[7] rated Respondent accordingly on her annual/summative evaluations. Respondent Exhibit 1.

Respondent holds a Master's Degree with competency in Autism for Special Educators. She has teaching certifications in general elementary, general education in middle school, special education in elementary, special education in middle school, and special education in severe disabilities from birth through two years of age, elementary and middle school. Additionally, at all relevant times Respondent was a Board Certified Behavioral Analyst ("BCBA"), certified in Applied Behavioral Analysis ("ABA"). Respondent was the only District employee so certified.

The Bridge Program began the year before Respondent was hired. The purpose of the program was to provide the least restrictive learning environment for students on the Autism Spectrum, to "bridge" between elementary school and high school. The focus of the Bridge Program was on student independence, activities of daily living ("ADLs"), taking care of self, social skills, language skills and communicating in the community, such as shopping in stores.

At all relevant times, the Bridge Program was a 6:1:2 class, meaning a maximum of six (6) students to one (1) teacher (Respondent), and two (2) Teaching Assistants ("TA"s). The Bridge Program's full-time TAs were Jean Marie Marciano a/k/a Jean Marie Lilly ("Marciano"), and Lauren Schneider ("Schneider"). There was also a 1:1 TA

[7] After initial introduction, witnesses are generally referred to by last name only.

for particular students if called for on a student's Individualized Education Program ("IEP"). The 1:1 TAs were typically part-time District employees, one working the morning and one working the afternoon in Respondent's classroom.

Push-in and pull-out services were provided by other staff. These other staff included, but were not limited to: Occupational Therapist ("OT") Laura Ragona ("Ragona") who provided push-in services; Physical Therapist ("PT") Renee Ceileski ("Ceileski ") who provided pull-out services; and Speech and Language Therapist/Pathologist, Teacher of Speech and Language Disabilities ("ST") Parker Ramsey ("Ramsey") who provided pull-out services.

As noted above, Respondent's supervisor was LBMS Special Education Coordinator Russo. Russo's supervisor was Sabrina Brancaccio-Cantore ("Cantore"), the District's Executive Director for Pupil Personnel Services. Russo also reported to the LBMS Principal, Dr. Michelle Natali-Clune ("Natali"). Russo supervised Respondent and her TAs. Cantore supervised Ragona and Ceileski. The District's Executive Director for Human Resources was Dr. Randie Berger ("Berger").

During the charged school years, the Bridge Program had the following students:

2012/2013: Six (6) students: B, C, D, E, H, and Q.

2013/2014: Five (5) students: B, D, E, H, and N.

2014/2015: Three (3) students: A, B, and N.

It is undisputed that these students, all of whom were at all relevant times between 11 and 14 years old, were in the low-functioning range of the autism

spectrum, severely disabled, had difficulty communicating, were essentially non-verbal and were vulnerable. The parties were in agreement that none of these students be called as witnesses.

Throughout the charged school years Respondent's classroom was physically located in LBMS Room 302.[8] No other classes were assigned to Room 302. The room was the subject of a site visit conducted jointly by the Hearing Officer, both counsel and both parties. At all relevant times Room 302 was a full-size classroom, rectangular in shape. In accordance with the bird's-eye map of LBMS (District Exhibit 20, north at the top of the map), and with the parties' stipulations, Room 302 had the following overall dimensions: 30 feet long along the north and south walls, and 26.5 feet long along the west and east walls. The door between the hallway and classroom was located in the southeast corner of the room, along the south wall.

Located in the southwest corner of Room 302 was a bathroom, rectangular in shape, stipulated as measuring by 6.5 feet long along Room 302's south wall and 8 feet long along Room 302's west wall. This is the bathroom involved in Charge 1.

The bathroom was separated from the classroom by solid walls and a wooden door. There were no windows in the bathroom walls or door. There were no viewing or listening devices to observe from the classroom, through the walls or door, into the bathroom (nor vice versa).

---

[8] Except for a period of time during the 2012/2013 school year, when it was temporarily located in Long Beach High School as a result of Hurricane/Superstorm Sandy damage to the LBMS building.

As one entered the bathroom, the wall on the left (the south wall, adjacent to the hallway wall) was equipped with a fixture for holding and dispensing toilet paper from a roll. Mounted to the wall just above the toilet paper holder/dispenser was one horizontal grab bar, and just above it, one vertical grab bar. On the adjacent wall in a clockwise direction (the west wall), near the southwest corner of the bathroom, was a wall-mounted automatic-flush porcelain water-filled toilet. Mounted on the wall just above the toilet was one horizontal grab bar, at the same height as the horizontal grab bar on the south wall.

Also on the west wall, near the northwest corner of the bathroom, was a wall-mounted porcelain sink. Above the sink was a wall-mounted metal mirror. On both sides of the mirror were wall-mounted soap dispensers.

There were no support legs under either the toilet or sink. The plumbing behind and above the toilet, and under the sink, were fully exposed. Both the toilet and sink were in working order and supplied with water via pipes from the walls.

On the adjacent wall in a clockwise direction (the north wall) were a wall-mounted electric hand dryer, and a wall-mounted metal folded-paper-towel dispenser.

On the adjacent wall in a clockwise direction (the east wall) was a metal semi-recessed removable garbage receptacle, approximately 3 feet tall and 2 feet wide. The bottom of the garbage receptacle was approximately 1 foot above the floor.

Two square metal corners of the bottom-front of the garbage receptacle jutted-out approximately 6 inches from the east wall, into the bathroom space, approximately 1 foot above the floor.

The bathroom floor consisted of 1-foot by 1-foot ceramic tile squares. The bathroom walls consisted of rectangular ("subway" style) ceramic tile from the floor edge, up to a height of approximately 4.5 feet. Above the tile, the wall was painted drywall, up to the edge of the ceiling.

Based upon the foregoing, and the record as a whole, the bathroom contained inherent dangers to the health, safety and welfare of a student placed alone therein while tantrumming.

The bathroom door was hinged along the south wall, swinging open into the classroom. The door did not swing into the bathroom. It was equipped with a horizontal metal door handle on both the inside and outside of the door (one on each side). The door latched closed when fully shut. It was not equipped with a lock or locking mechanism. The bathroom door was not otherwise equipped with any lock or locking device.

Notably, the bathroom door and its metal door frame were approximately 3.5 feet in width, along the bathroom's east wall. If the bathroom door was ajar, a person standing in the classroom had a view into the bathroom of only part of the bathroom's south wall. If the door was opened further, one could also see the toilet, which was mounted on the west wall, centered at 2 feet north of the south wall. The door jamb and east wall of the bathroom blocked the view into the remainder of the bathroom. A person standing in the classroom, at the bathroom door – ajar, and/or with a foot in the bathroom doorway to keep the door from closing, had *no view of the remainder of the bathroom*, including no view of the sink and raised metal garbage receptacle. To see

this remaining part of the bathroom, one would have to place at least their head *into* the bathroom, to see beyond the door jamb and east bathroom wall.[9]

Inside the bathroom was a rolling cart with supplies, and a portable table on which were baskets containing each of Respondent's three (3) students' toiletries, used to assist them with learning personal hygiene ADLs.[10]

As discussed below, in November 2014 allegations which eventually led to Charge 1 were brought to the District's attention. The District immediately commenced an investigation. On November 18, 2014 the District removed Respondent from classroom teaching duties, and also removed both of Respondent's full-time TAs, Marciano and Schneider. T1755. During the course of the District's investigation, other misconduct allegedly occurring within the three (3) year 3020-a statute of limitations look-back period came to light. T1708-1709. As is common in 3020-a matters, these other allegations resulted in additional charges [redacted] in this proceeding. The Hearing Officer disagrees with Respondent's assertion that the additional charges constitute bad faith "piling-on". T5452-5454.

On or about March 10, 2015, the District filed these [redacted] charges against Respondent. The charges were assigned SED No. 26,724. Respondent filed a timely request for a hearing, leading to this proceeding. As noted above, at Respondent's

---

[9] The Hearing Officer finds, particularly in light of the site visit to LBMS Room 302, that Special Education teacher Janna Arkow inadvertently reversed "toilet" and "sink" in her testimony. T3588-3590.

[10] Charge 1, the bathroom charge, applies only to the 2014/2015 school year, during which Respondent had three (3) students.

discretion, and upon timely request pursuant to 3020-a, the hearings were open to the public.

Respondent argues that the District's investigation of these charges was "*fatally flawed*", "*one-sided and incompetent*". Respondent Brief 3. The Hearing Officer disagrees. Under the facts and circumstances of this record the Hearing Officer is not persuaded that the District's investigation was unfair to Respondent, or insufficiently thorough. Respondent was interviewed on November 17, 2014, with her Union representative present. T1754, 4144. Also interviewed on November 17 were staff who worked in Respondent's classroom and/or provided services to her students during school. T1752-1753. During the next two (2) months of this investigation Berger interviewed 32 people regarding Charge 1 (T1802), 37 people overall (T1932).

The NYS Commissioner of Education quotation from the *Goshen* case cited by Respondent (Respondent Brief 102-103) is distinguishable. It refers to the investigation in a case where the charges "largely lack[ed] substance". The Hearing Officer finds that the charges in the case at bar do not "largely lack substance". Rather, the charges are substantive and serious. Again, as noted above, a 3020-a proceeding is an independent *de novo* due process hearing. Respondent's due process rights were not violated.

Turning to the merits, most of the facts pertaining to the [redacted] charges *are* materially in dispute. Witness testimonies provided sharply conflicting versions of most of the relevant events. Thus, the outcome of each charge hinges substantially upon Hearing Officer credibility determinations.

FINDINGS OF FACT, AND CONCLUSIONS, EACH OF THE EIGHT (8) CHARGES

CHARGE 1[11]

During the Fall of 2014, Respondent endangered the health, safety and/or welfare of Student A, a disabled student classified by the Committee on Special Education ("CSE") as having an intellectual disability, in that on one (1) or more occasions Respondent and/or staff members at Respondent's direction placed Student A in and/or caused or allowed Student A to be placed in an unauthorized and inappropriate time out room, namely the classroom bathroom in response to Student A's behavioral outbursts.

The District met its burden of proof on this charge. Respondent is guilty of Charge 1. Under the facts and circumstances of this record, Respondent's culpable conduct on this charge constitutes misconduct, neglect of duty, and conduct unbecoming a teacher.

The following Charge 1 findings of fact, and conclusions, are presented in chronological order where practicable. They are followed by separate non-chronological subject matter subsections of discussion, further findings of fact, and conclusions.[12]

During the Charge 1 time period (Fall 2014 of the 2014/2015 school year) Respondent had three (3) students in her class: Student A, Student B, and student N. During the same time period, Respondent had two (2) full-time TAs, Schneider and

---

[11] Each charge is set forth in ***bold italics***, at the beginning of its respective section, *verbatim* from the Statement of Charges.

[12] There is a degree of overlap/repetition in this Opinion and Award regarding Charge 1 due to its compound elements, the parties' various positions and arguments, and the nature of the record. Therefore, section headings, which are provided for the reader's convenience, are not necessarily all-inclusive.

Marciano, and two (2) part-time 1:1 TAs for Student B: in the mornings Suzanne Fenech, who was replaced after two (2) weeks by Ariel Seligman, and in the afternoons, Jane Ryan.

During the Charge 1 time period, Ragona provided push-in occupational therapy services in Respondent's classroom. On the morning of Thursday, November 6, 2014,[13] Ragona noticed something unusual in Respondent's classroom. Normally, there was a folding table in the classroom bathroom, upon which Respondent's three (3) students each had a basket containing deodorant, toothbrush, toothpaste, hair brush/comb, and the like, for learning their personal hygiene ADLs. On November 6, Ragona noticed that the folding table and baskets were in the classroom, rather than inside the bathroom. She asked why. Schneider and Respondent informed Ragona that this was because "*Student A had been tantruming*[14] *in the bathroom and throwing all the things all over the place so they were removed so he couldn't do that.*" T1190. Respondent testified, "*We removed anything that because he was when he tantrummed was destructive. We removed anything that he could potentially pick up and throw . . . and it hits off the wall and it ricochets and hits him.*" T4857. Respondent testified the folding table and the "wheelie [rolling] cart" containing extra underwear, wipes, latex gloves and Band-Aids, were also removed to give Student A more space in the bathroom. T5063-5064.

---

[13] All Charge 1 alleged conduct took place in calendar year 2014. For brevity, the year is hereinafter omitted from dates in this section.

[14] Tantruming/Tantrumming: This Opinion and Award uses the double-m spelling. The transcript uses the single-m spelling. Transcript quotations preserve the single-m spelling.

Later, also on November 6, as a result of this information, Ragona initiated a group text message with Respondent at 5:15 PM, because she was "*concerned that Student A was in the bathroom tantruming with all the hard surfaces that he could potentially hurt himself on.*" T1191. The text message group consisted of Ragona, Respondent and Ramsey. Only Ragona and Respondent sent messages.[15] The text messages concluded on Friday, November 7, with Ragona requesting a team meeting [12:28 PM text message], and Respondent responding "*Sure - lets talk Monday and try to find a date that works*" [12:50 PM text message].

One (1) hour and 14 minutes after Respondent's 12:50 PM text message to Ragona on Friday, November 7, Respondent sent an email to her (Respondent's) supervisor, Russo, with "[Student A]" as the subject line. The email stated, in full, *verbatim*:

> *Hi Vinny-*
>
> *I think we may need to have a program review for [Student A].*
> *My data does not reflect enough progress on goals IEP that were to be maintained over the summer in order to justify moving forward with current fall IEP goals.*
> *I think [Student A] may require some new goals that better reflect his current skill levels.*
>
> *Lisa :-)*

Respondent Exhibit 68.

Respondent addressed this email to Russo, and copied it to Ramsey. Respondent

---

[15] The chain of text messages is in evidence as Respondent Exhibit 102, and is discussed more fully below.

neither addressed nor copied the email to Ragona. Respondent's email does not mention behaviors, tantrums, time outs or the bathroom.

On Wednesday, November 12, Russo was in Respondent's classroom on a "pop-in" to observe a student who was being considered for a less restrictive environment. While there, Respondent approached Russo and told him that Student A "*seemed to gravitate toward the bathroom*", "*work his way to the bathroom*", "*put himself into the bathroom*" for time out for behavioral reasons, or when having problems. T786-787, 918, 929-933, 1129-1130. Respondent and Russo agreed this was "*kind of a strange thing*", "*rather odd*", "*slightly odd*". T786-787, 1130, 4874-4875.[16] Respondent did not say to Russo that Student A was being *placed* in the bathroom. T918-919.

Later, also on November 12, the team meeting referred to in the text messages of Friday November 7 and Monday November 10 (Respondent Exhibit 102) took place in Respondent's classroom (November 11 was a holiday). The four (4) participants were Respondent, Ceileski, Ragona and Ramsey.[17] During the team meeting Ragona and Ceileski expressed concerns about Student A being placed in the bathroom for time out. T3844.

During the team meeting Respondent stated that: for behavioral reasons Student A was being physically brought to the bathroom and put in the bathroom alone; she

---

[16] Respondent contends that this conversation occurred on November 6, not November 12. As discussed below, the record establishes it occurred on November 12, not November 6.

[17] Earlier on November 12 Respondent and Ramsey had a conversation about the bathroom and Student A. This is discussed below.

had removed items from the bathroom that could be injurious, and did what she felt could be done to make the bathroom a safe environment; the bathroom door was closed while Student A was in the bathroom; there was not a visual on him in the bathroom; a staff member would listen from outside the closed bathroom door; if Student A tried to open the door while still upset, the staff member outside the closed bathroom door would hold the door shut to prevent him from exiting, which Respondent acknowledged during the meeting was essentially locking Student A in the bathroom; Student A's amount of time spent in bathroom time outs would be noted, but there was not a time limit; Student A would be kept in the bathroom until he stopped tantrumming; Student A had been in the bathroom for time out approximately 10 times; Student A's parents were not specifically aware of the bathroom time out strategy, and there was no specific parental permission to use the bathroom for Student A's time outs. T1192-1196, 1224-1233, 1251-1252, 3844-3847, 3862-3863.

During the November 12 team meeting Respondent did not say that the bathroom was used by Student A to avoid being attacked by Student B (T3868), nor did Respondent say that Russo was specifically aware of *this* strategy of hers. T1224-1225. Respondent's testimony to the contrary is not credible.

At the end of the team meeting Ragona and Ceileski told Respondent that they were still uncomfortable with the situation. Respondent told them they did not have to implement the strategy, and ". . . *that Mr. Russo was aware of the situation and that if*

[they] wanted to talk to him that [they] could." T1197, 1213, 1233, 1256.[18] Respondent told Ceileski that Russo was "*fully aware of what she [Respondent] was doing*", and Respondent was "*fine with [it]*" when Ceileski told Respondent she (Ceileski) would be talking to Russo about this. T1256.

At 6:37 PM, also on November 12, Ragona sent an email to Russo, Respondent's supervisor, stating, in full, *verbatim*:

> *Hi Vinny,*
>
> *Renee [Ceileski] and I are planning on coming to your office at the start of our day tomorrow (between 8:30 and 8:45) to discuss an important matter with you. We hope the you will have a couple of minutes to meet with us.*
> *Thank you.*
>
> *Laura*

District Exhibit 15; T1212-1213.

Ragona did not receive a reply to this email from Russo that evening. T1197.[19]

On Thursday, November 13, Russo went to Respondent's classroom before 8:30 AM. Respondent was not there. He returned to his office and at 8:33 AM sent an email to Respondent, stating in full, *verbatim*:

> *Hi Lisa,*
>
> *Sorry to hear Chloe [Respondent's dog] is not well…hope she bounces back. was thinking of our conversation re: [Student A] last nite and was not sure if I heard*

---

[18] Respondent cites this as proof that Respondent had nothing to hide. This is discussed below.

[19] Respondent contends that Russo replied to this email on the evening it was sent. Respondent Brief 21-22. Russo testified he did not see the email until the next morning. T933-935. This discrepancy is discussed below.

something correctly or not. I just came from your room as I wanted to discuss this in person.

If his behavior plan involves a "timeout" in the bathroom that must be changed immediately. Such a consequence could be perceived as inhumane or abusive. ..and we certainly don't want to go there.

I hate to ask you this, but is there a way for you to tell your staff to stop implementing this consequence immediately? I don't want to subvert your authority by having me go in there.

Again, sorry to bother you w/this while your dealing w/Chloe's illness, but I feel it's very important. Pls let me know your thoughts...

THX!
Vinny

District Exhibit 12.

Approximately 12 minutes later, at or about 8:45 AM, Ragona and Ceileski arrived at Russo's office. They expressed to him their concerns about Respondent's use of the bathroom for time outs for Student A, and Russo told them he had already sent an email to Respondent and was taking care of the situation. Russo viewed this as serious. T938-939, 1197-1198, 1262.

Later the same morning Russo again went to Respondent's classroom. Respondent was not there. He asked Respondent's two (2) full-time TAs, Schneider and Marciano, if they were using the bathroom for time outs for Student A. They confirmed that they were, ". . . *kind of sheepishly admitt[ing] to it*, . . .". T1131. Russo told them to immediately stop doing so, as it was an inappropriate intervention. T944-945, 789-791, 1131.

Russo returned to his office. Seeing no response from Respondent to his 8:33 AM

email (District Exhibit 12), at 10:13 AM Russo sent her another email, stating in full, *verbatim*:

> *Hi Lisa,*
>
> *Just an FYI…when I didn't hear back from you I just now stopped into your room and asked that the team not implement that consequence for the rest of the day. Assuming you're back in tomorrow, we can discuss it then live and in-person.*
>
> *Hope the pooch is ok…*
>
> *Vinny*

District Exhibit 13.

On Friday, November 14, at approximately 8:00 AM, Russo spoke in-person with Respondent. **Respondent admitted using the bathroom for Student A's time outs**, and "*seemed remorseful*". T1132. Russo told Respondent to stop doing so, as ". . . *this consequence . . . was inappropriate, [and] outside of any of our authority to implement . . .*". T793-794, 1131-1132.

Respondent did not say to Russo that Student A was placed in the bathroom to protect him from Student B. T1140.

Approximately an hour later, Russo informed *his* supervisor, Cantore, of the situation. T947. Russo informed Natali, as well.

Also on the morning of Friday, November 14, Ragona and Ceileski met with Cantore, who was *their* supervisor. They expressed to Cantore their concerns about Respondent's use of the bathroom for time outs for Student A, and that they had already reported this to Russo. T1140-1444, 1234, 1261-1263, 1626-1627, 1752. Cantore immediately called Natali and informed her of the concerns raised by Ragona

and Ceileski. T1624. Cantore then called Russo. T1625-1626, 1634-1635. Natali called Berger, and later on November 14 Berger met with Natali and Cantore in the LBMS conference room. T1796. Berger was going on vacation, and recommended that Natali and Cantore interview everybody who had been in Respondent's classroom, individually (*i.e.*, one at a time). T1798-1799. On the following Monday, November 17, Cantore and Natali commenced the District's investigation by individually interviewing Respondent and several such staff, with Cantore leading the interviews. T1752-1753, 4147-4149. The focus of the interviews was Respondent's use of the bathroom for time outs for Student A. T1753.

Respondent's Union representative was present at her Monday, November 17 interview (T1754, 4144), as was Natali. Berger was on vacation. Triggered by the concern about Respondent's use of the bathroom for time outs for Student A, the focus of the interview was gathering information about the behavioral strategies and processes and procedures being used in Respondent's classroom. T1471-1472, 1476.

Cantore informed Respondent of the concerns about Respondent's use of the bathroom for Student A's time outs, attributing the concerns to staff, without naming Ragona or Ceileski. T1645. Respondent was independently aware there were concerns, her knowledge of same stemming from the team meeting less than a week prior. T1636. Respondent informed Cantore and Natali of the strategies she had implemented or tried. With regard to Student A's tantrumming behavior, Respondent *". . . said that she's* ***moving to isolation****. That's how she said it.*" T1474-1476 [**Emphasis** added]. Cantore further testified:

> *[Respondent] explained that she tried to implement ignoring and that she tried to implement a break card. And then, she mentioned that she was moving towards isolation. And when I asked what that meant- what is isolation?* ***She did say that she was removing him and placing him in the bathroom.*** *And I inquired as to what that meant and how long was the student in there. Was the door open or closed? There was a series of questions to determine what isolation meant.*

T1474 [**Emphasis** added].

The isolation strategy was *already* in use: ". . . *she was using the strategy because I asked her and I wanted to verify and I said,* ***'So, you're placing student in the bathroom?' And she confirmed that."*** T1475-1476 [**Emphasis** added]. Respondent said she was using the isolation strategy because other strategies were not working. T1473-1475.

During the interview Respondent confirmed use of the bathroom for Student A. She stated that: she removed the table, cart and supplies from the bathroom; Student A would be kept in the bathroom from as few as two (2) minutes, to no longer than 10 minutes; timers were used to collect data; the bathroom door was ajar or cracked open; Student A was alone in the bathroom; and staff was outside the bathroom door with a visual on Student A through the ajar or cracked-open door. Respondent initially stated that Student A's parents were aware the bathroom was being used for time out, but then, ". . . *elaborated to say that she had told the parents that she was experimenting with different strategies*." T1636-1638; 4145-4146.

In her November 17 interview Respondent did not say that Student A was placed in the bathroom to protect him from Student B. T1753-1754, 4146.

The following day, Tuesday, November 18, Respondent provided Cantore with

her communication notebook, used during the school year to communicate with Student A's parents. T1754; District Exhibit 17. Cantore reviewed it and noted no entries to Student A's parents regarding time outs, or having tantrums. T1459-1460. The communication notebook is discussed in detail, below. Also discussed in detail, below, is the social story Respondent referred to in her interview and provided to Cantore. T1461, 1467; District Exhibit 18. Also on November 18, Respondent was reassigned from classroom teaching duties (as were both of Respondent's full-time TAs, Marciano and Schneider) and placed on administrative leave pending the investigation. T4149-4150.

On Monday November 24 Cantore, Natali and Russo met with Student A's mother. Student A's mother informed them that she was not aware that the bathroom was being used for time outs for her son (T1460, 4189), and that the communication notebook "*just said everything was fine*." T4151. Student A's mother's testimony is discussed below.

Upon return from vacation during the week of November 24, Berger met with Cantore and Natali to discuss the results of their interviews. As the District's human resources officer, Berger thereafter took charge of the investigation. T1801. She also interviewed (and in some cases, re-interviewed) staff about the bathroom allegation (Charge 1), as well as the additional allegations [redacted] that surfaced during the bathroom investigation. Berger interviewed 32 people about the bathroom allegation, 37 people in total, from early December 2014 through January 2015. T1478-1479, 1801-1803, 4149.

DISCUSSION, FURTHER FINDINGS OF FACT, AND CONCLUSIONS - CHARGE 1

The District proved all of the elements of Charge 1.

It is undisputed that Student A is a disabled student classified by the Committee on Special Education ("CSE") as having an intellectual disability; that the actors in this charge were Respondent, and staff members acting at Respondent's direction; and that the location involved in this charge was the classroom bathroom.

The remainder of the elements of Charge 1 are disputed. With respect to the disputed elements of the charge, the record compellingly establishes that Student A was placed in the classroom bathroom in response to his behavioral outbursts – in other words, time outs in the classroom bathroom as a consequence of his tantrums; that this happened on several occasions; that the classroom bathroom was an unauthorized and inappropriate time out room; and that Respondent thereby endangered the health, safety and welfare of Student A.

Respondent argues that:

> *The first charge is for allowing Student A to use the bathroom for time out. However, the time out was approved by Russo, her supervisor. It complied with the Long Beach School's Code of Conduct (the "Code"). It complied with the seven-year history of using time out in the District. It was measured, it was controlled, it was effective, and it kept a student safe who would not otherwise have been.*

Respondent Brief 3.

As discussed below, the Hearing Officer disagrees, and finds and concludes that Respondent's conduct violated the Code.

The Code of Conduct of the Long Beach Public Schools allows a teacher to use:

> *[G]ood classroom management techniques . . . to give the student an opportunity to regain his or her composure and self-control in an alternative setting. Such practices may include, but are not limited to:*
>
> *1. Short-term "time out" in an elementary classroom or in an administrator's office;*
>
> *2. Sending a student into the hallway briefly;*
>
> . . .
>
> *Time-honored classroom management techniques such as these do not constitute disciplinary removals for purposes of this code.*

Respondent Exhibit 54, pp. 24-25 [Emphasis added].

Respondent's defenses to this charge can be summarized as follows, in *italics* to indicate that they are drawn from Respondent's Brief: *Student A self-selected the bathroom to self-soothe; Student A wanted to be alone in the bathroom and was made to feel alone but was never actually alone in the bathroom; loud noises of Student A's tantrumming provoked Student B, who would then try to attack Student A; Student B was the student who came to school with feces under his fingernails, and he was a known scratcher and biter; it was necessary for Student A's protection to use the bathroom for his safety from Student B; Student A felt safe in the bathroom.*

The bathroom was part of Respondent's classroom and therefore was not a time out room. Even if the bathroom was not part of Respondent's classroom, Respondent acted in accordance with the extensive custom and history of using time out in the District: Student G was put in multiple different rooms for time out; Student B was put in time out in multiple locations; time out was approved and used for Student C; multiple locations were used for time out with Student F; other time out areas were used by the District; and the bathroom

was used to address Student E's behaviors. If Section 200.22 was violated, Respondent is not responsible for that violation; and, under the circumstances presented, Respondent should not be found culpable for using the bathroom for time out.

PLACED ALONE IN THE BATHROOM IN RESPONSE TO HIS BEHAVIORAL OUTBURSTS

The record establishes that as a behavioral consequence, Respondent, and staff at Respondent's direction, *placed* Student A in the bathroom, *alone*, with the *door closed*, under *limited or no visual observation*, and *confined* him alone therein. The record establishes that this was inappropriate, unauthorized, unnecessary and demonstrated poor judgment on Respondent's part.

Social Story

The social story (District Exhibit 18), undisputedly created and written for Student A by Respondent (T4846), is *compelling* evidence of Respondent's culpability under Charge 1.

LBMS School Psychologist Dr. Jean Schlegel testified that a social story "*I[s] a story that's specific for the student that speaks about how to behave. . . . So, it would be a story about that specific student using that specific student's name, telling a story about appropriate behavior*." T3366. Russo characterized a social story as "*kind of like a very simple picture book*." T1132.

Cantore testified that:

> *A social story is used for students to walk them through an activity or an event. It typically has the student as the character in the story, so that they can understand what the expectations and what they're going to experience. And they can be used for a number of social activities- it could be shopping. It*

could be getting a haircut. It could be school--a school function. It could be school itself.

T1460-1461.

Respondent testified that:

[T]here's two different kinds of social stories. One is a situational social story where you're telling them and preparing them in advance for a certain situation or event that they might experience like going to the dentist, what they may see, what they may hear, the steps that the process of going to the dentist, just so nothing is a surprise to them when they get there. And then there are behavioral social stories where you're trying to help the child process ***the appropriate behaviors that you're wanting to see and the consequences of inappropriate behaviors.***

T4546 [**Emphasis** added].

The social story Respondent created for Student A is a behavioral social story ("social story"). T4846, 5020. Student A's social story consists of ten (10) pages of letter-size paper, in portrait layout. Each page contains an image, and text underneath, relating to the image. The contents of the social story are set forth below, in full, *verbatim*, with a verbal description of each image:

- - - - - -
Page 1 (Cover)
Image: photo of Student A.

Text: "*[Student A] goes to School!*"
- - - - - -
Page 2
Image: photo of Long Beach Middle School entrance.

Text: "*[Student A] is a big boy! [Student A] goes to Long Beach Middle School and his teacher's name is Ms. Weitzman. [Student A] likes going to the Middle School and seeing all of his friends!*"
- - - - - -
Page 3
Image: photo of Student A and two (2) other students in classroom.

Text: "*When [Student A] gets off the school bus in the morning, he says hi to his friends and teachers and then walks to his classroom.*"

- - - - - -

Page 4

Images: photo of Student A's classroom locker; image of a notebook and a backpack.

Text: "*When [Student A] gets to the classroom, he unpacks his backpack. He puts his book away and his lunch away. Then he puts his jacket and backpack in his locker.*"

- - - - - -

Page 5

Image: color drawing of a student at a desk with book, paper and pen.

Text: "*Next, [Student A] sits down and does his morning work. If [Student A] listens to his teachers and does his work, [Student A] gets to play with Papa when he is done! When [Student A] listens to his teachers, everyone is happy!*"

- - - - - -

Page 6

Image: alarm clock with yellow sticky atop the clock; "break" written on sticky.

Text: "*If [Student A] does not want to do his work, he can **use his words** or give his teacher his **break card**. [Student A]'s break card is on his token board. He can give it to a teacher anytime he does not want to do work or needs to take a break. [Student A] is a good boy when uses his break card!*" [**Emphasis** in original].

- - - - - -

Page 7

Image: color drawing of a child laying prone on the floor with outstretched arms and legs, apparently crying and/or screaming, apparently with clenched fists, with a red circle around the child, and a red diagonal line through the circle [similar to universal "No Turn" traffic signs].

Text: "*When [Student A] does NOT listen to his teachers, everyone is sad ☹ When [Student A] cries and lays on the floor, [Student A] cannot have Papa or the smartboard.*"

- - - - - -

Page 8
Image: color photograph of part of the bathroom in Respondent's classroom in the Fall of 2014, showing the toilet, sink and mirror above the sink.

Text: "*When [Student A] cries and lays on the floor, he has to go sit in the bathroom alone until he stops crying. Papa is sad when [Student A] has to sit in the bathroom* ☹"

- - - - - -

Page 9
Images: W.B. Mason paper company logo, and close-up of the face/head of the logo.

Text: "*[Student A] is a good boy. When [Student A] listens to his teachers and does his work, Papa is happy! Papa is also happy when [Student A] uses his words and does NOT cry!*"

- - - - - -

Page 10
"The End." [no image].

District Exhibit 18.

Student A referred to the image of the face in the W.B. Mason paper company logo as his "Papa", *i.e.,* his father. He collected them from paper boxes in school. This is the use/reference to "Papa" in the social story. T5024-5025.

The Hearing Officer has considered each page of the social story, individually,[20] and in the context of the whole social story, as well as in the context of the hearing record pertaining to the social story.

The most critical page of the social story with respect to Charge 1 is page eight (8). As stated above, page eight (8) contains a color photograph of the bathroom in Respondent's classroom in the Fall of 2014. The text underneath the photograph states:

[20] Respondent testified that the pages of the social story do not necessarily need to be read together. T5026.

> "**When *[Student A] cries and lays on the floor, he has to go sit in the bathroom alone until he stops crying. Papa is sad when [Student A] has to sit in the bathroom* ☹"**

District Exhibit 18 [**Emphasis** added].

This page is clear: The consequence for crying and laying on the floor is that Student A **has to go** sit **in the bathroom**. **Alone.** **Until he stops crying.** Crying and laying on the floor were known tantrumming behaviors of Student A, and constitute "behavioral outbursts" within the language of Charge 1.

This social story language is ***mandatory language*** directed at a vulnerable, non-verbal, intellectually disabled middle school child. It was read to him by authority figures – Respondent and her staff. T4850. These authority figures gave Student A no choice, no options. You tantrum, you go in the bathroom, alone, until you stop. A mandatory behavioral consequence. The record establishes that this was a ***negative and aversive mandatory behavioral consequence.***

Respondent testified on cross-examination that she used such language because these students ". . . *don't understand vague subtleties. You have to teach them things as though they've very specific rules, and we use if[/]then statements to do that. If you do this, then this happens*. . . .". T5179-5180. She testified further on cross-examination:

> *And none of the things that I mention are punishment. It's consequence. If/then statements. If you do this, then this happens. If you do this, then this happens. If you speed, you get a speeding ticket. I mean it's subjective.* ***I understand that you find something very aversive about the bathroom. I don't.***

T5243 [**Emphasis** added].

Respondent's steadfast testimony that such use of the bathroom is *not* aversive is

against the overwhelming weight of the credible record evidence. This reflects poor judgment for a teacher, and demonstrates Respondent's failure to grasp the seriousness and inappropriateness of her culpable Charge 1 conduct.

Additionally, Respondent's testimony about the need to use non-subtle if/then statements is not persuasive. Assuming, *arguendo*, that Respondent is correct, it does not justify or excuse her use of the bathroom for Student A as a negative and aversive mandatory behavioral consequence.

There is no mention in the social story, at all, of soothing or self-soothing in the bathroom. Respondent testified that "*He doesn't understand the word self-soothe*." T5023. Be that as it may, there is no attempt in the social story to say soothe or self-soothe, in *any* words at all, at *any* level of vocabulary. There is no mention in the social story, at all, at any level of vocabulary, of Student A going, or having the option to go, somewhere else – anywhere else – other than into the bathroom.

There is no mention in the social story, at all, at any level of vocabulary, of Student A selecting, self-selecting or choosing the bathroom, or having the option to select, self-select or choose going into the bathroom.

There is no mention in the social story, at all, at any level of vocabulary, of Student A feeling safe, feeling threatened, or avoiding any other student for any reason whatsoever.

<u>Placed into the Bathroom</u>

The record establishes that Respondent, and staff at Respondent's direction, placed Student A in the bathroom.

Ramsey testified credibly that during the November 12 team meeting Respondent admitted that she *put* Student A in the bathroom. T3844-3845. The Hearing Officer also credits the testimony of Ragona (T1193) and Ceileski (T1230-1231) that Respondent stated at the team meeting that Student A was being placed in the bathroom.

During the team meeting, and during the Respondent-Ramsey pre-team-meeting earlier the same day, Respondent did not say the bathroom was used by Student A to avoid being attacked by Student B. T3868.

On November 6, when Ragona originally inquired in-person about use of the bathroom for Student A, Respondent did not say that Student A self-selected the bathroom, nor did Respondent say that Student A was in the bathroom to feel alone, or safe, or for protection from Student B. Respondent did not say these things to Ragona and Ramsey in their group text messages of November 6 and 7. Respondent Exhibit 102.

Schneider testified that Student A was "*guided*" (T4323, 4325), or *"put"* (T4494-4495), into the bathroom. Schneider testified that other than the first time that Student A went in the bathroom, "*we guided him in . . . we put him in, he didn't give any resistance*." T4476-4477. This was Respondent's decision and was done by Respondent and by staff at Respondent's direction. T4323, 4479.

Seligman testified ". . . *kind of move--yeah, move the student [Student A] toward the bathroom, have them eventually move into the bathroom, . . .*" T4219. Throughout her testimony, Seligman never disputed questions posed to her referring to Student A being

put or placed into the bathroom.

Alone in the Bathroom

The record establishes that Respondent, and staff at Respondent's direction, placed Student A in the bathroom, *alone*.

The social story uses the word "*alone*". Respondent's testimony that the word "*alone*" in the social story was to ". . . *make him feel as though he was alone without actually being alone* . . ." (T5025-5027, at 5027), and was hurriedly added to the social story in 20 minutes to be ready for the next day (T5025) is not credible. This is discussed below.

Additionally, Respondent's text message replies in Respondent Exhibit 102 imply that Student A was *in the bathroom alone while tantrumming*. This is consistent with, and corroborates the credible record evidence that Student A was **alone** in the bathroom. Respondent's, Schneider's and Seligman's testimonies that Student A was never alone in the bathroom are not credible.[21]

The Hearing Officer credits the testimony of TA Ryan that in *October* 2014 she twice entered Respondent's classroom and heard Student A screaming inside the bathroom with the door closed, and subsequently observed that he had been alone in the bathroom. The Hearing Officer also credits Ryan's testimony that on the latter occasion she observed Marciano standing outside the bathroom, opening and closing the bathroom door to peek in on Student A while he was inside the bathroom. T2127-

[21] Marciano did not testify in this proceeding.

2128, 2135-2136. Ryan's testimony corroborates the credible record evidence that Student A was placed in the bathroom in *October and* November, not just in November.

The Hearing Officer credits TA Dayna D'Alessio's cross-examination testimony that Marciano stated ". . . *we take everything out before we put him in.*" T1345. This testimony corroborates that Student A was *placed* in the bathroom, and, that he was placed *alone* in the bathroom.

Furthermore, D'Alessio's testimony is corroborated by Respondent's testimony. As noted above, Respondent testified, "*We removed anything that he could potentially pick up and throw . . . and it hits off the wall and it ricochets and hits him.*" T4857. This reasonably implies that Student A was alone in the bathroom, and it speaks to a ricochet hitting only "*him*", not "*them*". Certainly, if Student A was able to pick up and throw things while in the bathroom (despite a staff member purportedly being in the bathroom with him), a ricochet could hit him *and/or* the staff member purportedly in the bathroom with him. The record shows that Respondent, commendably, had great concern for the safety of her staff in all respects. Therefore, Respondent's testimony omitting the ricochet risk to her staff is telling. Respondent's testimony also corroborates Cantore's testimony that during the November 17 interview Respondent stated she was placing Student A in the bathroom alone. T1637.

Russo testified credibly that when placed in a room for time out, ". . . *a student would have to be with someone. You can't just put a student in a room.*" T845-846; "*For me it's just basic, behavioral understanding.*" T1168. He also testified credibly in sum and substance that Respondent knew or should have known this. T1171-1172.

Bathroom Door Closed

Contrary to Respondent's assertions, the record establishes that Student A was indeed *alone* in the bathroom with the *door closed*. Additionally, even if Respondent or a staff member was right outside the bathroom door, and even if the door was at times ajar, or at times open the width of a TA's foot, rather than always fully shut, the fact remains that Student A was placed in the bathroom alone, often without Respondent or a staff member having visual contact. The Hearing Officer credits the testimony of Ragona (T1193), Ceileski (T1230-1231), Ramsey (T3844-3845) and Ryan (T2126-2127).

Ramsey testified credibly that ***Respondent stated at the team meeting that Student A would be inside the bathroom with the door closed***, with a staff member listening ***from outside***, ***there were no visuals on the student***, and that to Ramsey's knowledge, Student A's "parents were not aware of this as of that time." T3844-3846. [***Emphasis*** added].

Schneider's (T4321) and Seligman's (T4219) testimonies that the bathroom door was never closed when Student A was in the bathroom are not credible. The Hearing Officer does not credit Respondent's testimony that the door was always open, usually halfway, and that there was always a visual on Student A. T4855-4860, 4935. The Hearing Officer does not credit Schneider's testimony that she always had her foot in the door (T4481) and always had a visual of Student A (T4329). Notably, Schneider testified that because she had her foot in the door, ". . . *it wasn't closed,* ***but it wasn't really open either***." T4478 [**Emphasis** added].

Confined in the Bathroom

The record establishes that Respondent, and staff at Respondent's direction, *prevented Student A from leaving the bathroom* if he was not finished tantrumming. This constituted confinement. It also constituted isolation, Student A being alone while confined in the bathroom.

The Hearing Officer credits the testimony of Ragona (T1193-1194) and (Ceileski T1231). Ragona testified credibly that at the team meeting, after listening to Respondent, Ragona stated to the team, "*[S]o essentially the student [Student A] is locked in the bathroom.*" Ragona testified credibly that in direct response to this statement, Respondent stated "*Yes*." T1194-1195.

Asked, "When was Student A able to come out of the bathroom?", Seligman testified: "*Once he was calm, and once Student B was calm.*" T4221. In light of the full record, the implication of this testimony is that Student A was *not* able to come out of the bathroom *until* he was calm. The record is clear that "able to come out" refers to when Respondent was *allowed* to exit the bathroom.

Schneider testified that Respondent directed her to hold the bathroom door closed while Student A was in the bathroom, ". . . *because he [Student A] was trying to push it and go get attention from other people. Now I was with him; he wasn't trying to maliciously hurt anybody or himself, but he was trying to grab at people.*" T4479. Crucially, this credible testimony also belies Respondent's defense that Student A self-selected the bathroom to self-sooth in, and that he wanted to be alone in the bathroom, or "feel"/"think" he was alone in the bathroom.

Schneider testified that she used force to hold the door closed when Student A was trying to get out of the bathroom, but only for ten (10) seconds: "*I wouldn't hold it any longer because the kid was trying to get out, I'm not holding it longer than ten seconds*." T4480. Her explanations/justifications that, "*If he came out, he would have probably gotten bit by Student 'B' by 'B'.*" (T4480), or might have lost his balance (due to his medical condition) because his shoes were off (T4504), are not credible.

Amendment of the Social Story

Respondent contends that the social story should not be read literally, particularly the word "*alone*" on page eight (8), because she hurriedly added that page to the social story, in about 20 minutes, after a conversation with Russo, to be ready for the next day. T5025, 5058. This is not credible testimony. Respondent testified that the word "*alone*" on said page means that Student A would "*feel alone*" or "*think for all intents and purposes that he was alone even though we were never going to leave him alone.*" (T5025-5027, at 5026). This is also not credible testimony.

Respondent testified on direct examination:

> *The social story was changed when we noticed that he was running or choosing to go into the bathroom instead of the desk area that I had provided for him. So initially there is a page in his social story that talks about going into the bathroom. Originally, it was a page talking about sitting at that desk right in front of my desk and there was a picture of him sitting there. And then once I discovered it seemed that he was--I mean, I thought it was smart to run to the bathroom. I thought it's certainly much safer. And once he started doing that I changed the social story. I thought it was a good idea. Certainly, in all*

sincerity, certainly a lot safer than the locker he crawled into later on.

T4861.[22]

Respondent testified on cross-examination:

> *Initially this page was directing him to go to the desk that I had set up facing my desk and that was something that we had to guide him to do, so it wouldn't have said you can go if you would like. It would have been more direct. But I made this page in about 20 minutes after I had spoken to Mr. Russo so we were prepared the next day in school for when this happened. Did I word it the best I could have worded it? No.*

T5025.

Respondent's testimonies block-quoted immediately above are not credible. Respondent testified that Student A first self-selected the bathroom on November 5, and then did so again on November 6, 10, and 12. T5040-5041. Respondent contends, unpersuasively as discussed below, that this conversation with Russo (T5025) took place on November 6. Assuming, *arguendo*, that the conversation with Russo did take place on November 6, and assuming without finding that Respondent *"made this page in about 20 minutes after I had spoken to Mr. Russo so we were prepared the next day in school for when this happened.",* there is nothing in the record to suggest that after November 6 Respondent did not have sufficient time or opportunity to re-amend the social story to refine her choice of wording.

In light of the entire record, the overwhelming weight of the credible evidence is that Respondent did not do so because the words Respondent used in Student A's

---

[22] Respondent's comparison to Student A's one-time locker incident is discussed below.

social story were meant by Respondent to mean exactly what they say. The record establishes that the word "*alone*" on page eight (8) of the social story does *not* mean that Student A would "*feel alone*" or "*think for all intents and purposes that he was alone*". Rather it means that **Student A <u>would be alone</u> in the bathroom**. And, it means that this mandatory ("*has to*") consequence ("*go sit in the bathroom alone*") would occur "*[w]hen Student A cries and lays on the floor*", and the consequence would not end "*until he stops crying*". District Exhibit 18. The District's argument that this constitutes punishment is persuasive. District Brief 73-74.

<u>Protection of Student A From Student B</u>

A bedrock of Respondent's defense to Charge 1 is that Student A screamed in "*a high-pitched wail when he tantrumed. . . . Student B . . . had difficulty dealing with loud noises, particularly those made by Student A. Student B would respond by trying to attack Student A*." Respondent Brief 2.

For example, Respondent testified on direct that at the November 12 team meeting:

> *I tried to explain to her [Ragona] that what was happening was two very different situations occurring simultaneously. One was me trying to decrease a behavior of tantrumming and the other is me trying to protect A from B. I didn't want--first things first, I needed to protect A from B. That was not a question, and that needed to happen first thing first. But I wanted to find a way to accomplish that while not reinforcing the tantrumming behavior.*

T4907.

Respondent also testified that "*B trying to attack A is what led him [Student A] to run into the bathroom.*" T5047. Neither of these testimonies are credible. As found

above, prior to her removal from teaching duties Respondent never raised this as a basis for using the bathroom for Student A. As discussed above, the record shows that Student A was *placed* in the bathroom, rather than that he *"[ran] into the bathroom"* of his own accord. Schneider's testimony that Student A would run away to the bathroom to avoid Student B is not credible. T4330.

Respondent's witness Ramsey was present at the team meeting. His credible and compelling testimony was that Respondent "*prompted [Student A] to go into the bathroom*" for "*demonstrated noncompliance when given an academic task*" **– not for protection of Student A from Student B**. T3808-3810 [Emphasis added]. As discussed below, Respondent's testimony corroborates Ramsey's testimony. Respondent cites Ramsey's testimony (T3868) for the proposition that "*Student A took himself to the bathroom during a tantruming episode.*" Respondent Brief 10. This mischaracterizes Ramsey's testimony. Ramsey did not testify that he observed Student A do so. Rather, he testified: "*Or I don't recall I recall being aware that that had occurred. I don't recall specifically I do recall hearing that. I don't recall if it was specific to that meeting.*" T3868. Ramsey's testimony is consistent with the clear language of the social story regarding Student A and the bathroom, and severely undercuts the credibility of Respondent's testimony and version of events.

The record *does* demonstrate that Student B had aggressive behaviors that could result in injury. These included biting, scratching and kicking. For example, Respondent Exhibits 14, 55, 59 and 82 (2012/2013 school year), and District Exhibit 4, Respondent Exhibit 83 (2013/2014 school year). Respondent emphasizes that on

November 19, the day after she was removed from the classroom, "*[Student A] was bitten on R arm (Deltoid) by [Student B]. Inprint* [sic] *of top and bottom teeth noted on arm. Skin intact. Will inform Mom when I have translator. Cleansed. [Student A] was calm. RTC* [returned to class]." Respondent Exhibit 30.[23] Indeed, Russo testified on cross-examination that he had some dialogue with Respondent about her concerns for the safety of Student A because of the behaviors of Student B. T906-907. However, at no time prior to her removal did Respondent inform Russo or mention anything to Russo about using the bathroom to protect Student A from Student B. T1140. Nor did Respondent inform Russo of the existence of the social story.

The fact that Student B bit Student A the day after Respondent's removal from the classroom is not persuasive evidence in defense of the charge. This was not atypical behavior for Student B. Similarly, Social Worker Gartung's November 24 note to file that "*Student A became defiant and refused to follow directions in class*. . . ." (Respondent Exhibit 62) is not persuasive evidence in defense of Charge 1. This also was not atypical behavior for Student A. Additionally, it is undisputed that ASD students do not react well to change, including change of classroom teacher. Indeed, Gartung testified that ". . . *anything that was a big change would throw him [Student A] off. And so there was a lot of difficulties in that time period, 11/24*, . . .". T3646.

---

[23] Schneider testified that the bite *did* break the skin. T4335. Her testimony conflicts with the written Health Office Log ("nurse's note") entry for this incident stating: [redacted] written by School Nurse McMahon. Respondent Exhibit 30. The Hearing Officer credits the Log entry / "nurse's note" and testimony of School Nurse Thurston. T2511-2513.

Respondent's testimony that the degree to which the bathroom door was open while Student A was inside the bathroom "*depended on B's proximity . . . It probably was a fluid kind of thing based upon where B was running around.*" is not credible. T5071-5072. Neither is Respondent's testimony credible that Student B, regarding Student A's high-pitched tantrumming noises:

> *[L]ike probably a month if not a little longer B held it together. He kept that frustration in, he used the strategies that we taught him. He would direct people to his visual board with his self-soothing strategies, and he just couldn't do it anymore. It just became too much, it was more than B could tolerate and B deferred back to his typical behavioral response to loud noises, which is aggression. . . . [geared toward] the child making the noise . . . with laser focus . . .*

T4849-4850.

Schneider's testimony that with regard to Student A, ". . . *'B' broke away from being able to have self-control, he was never really able to regain it. . . .*" is also not credible. T4323.

Assuming, *arguendo*, that Student A was placed in the bathroom for his own safety to prevent his high-pitched tantrumming noises from triggering an attack upon him from Student B, it stands to reason – particularly in light of the bathroom and classroom site visit conducted during the hearing – that the bathroom door would be *closed* to minimize such tantrumming noises reaching Student B's sensitive hearing. Respondent's testimony that the door was always open, usually halfway, and that there was always a visual on Student A (T4855-4860, 4935) is not credible. Similarly, the use of dividers would not prevent the source of the stimulus – Student A's high-pitched tantrumming noises – from reaching Student B's sensitive hearing. T4847-4848.

The record compellingly establishes that Student A was placed in the bathroom as a direct result of his tantrumming for "*noncompliance when given an academic task*" (T3808), or being given "*a non-preferred task*" (T4853), not tantrumming caused or aggravated by stimulation of Student A's senses. Therefore, Respondent's testimony that "*without the dividers I couldn't completely block all stimulation" to Student A* (T4846-4848, at 4847-4848) is not persuasive. Indeed, the cause of the November 24 tantrum incident cited by Respondent was that Student A *"refused to follow directions in class*" (Respondent Exhibit 62).

Student B may have sometimes been triggered by Student A's tantrumming. However, as found above, prior to her removal from teaching duties Respondent never raised this as a basis for using the bathroom for Student A. Rather, the record compellingly establishes that Student A was placed in the bathroom as a direct and negative consequence of his tantrumming for "*noncompliance when given an academic task*", or being given "*a non-preferred task*", <u>not</u> for protection from Student B.

In summary, Respondent's belated attempt to justify placing Student A in the bathroom for protection from Student B is not persuasive.

<u>Appropriate Alternatives Available</u>

Respondent argues that she had no appropriate alternative to using the bathroom for Student A. This is not persuasive.

As noted above, during the Charge 1 time period Respondent had three (3) students in her class: Student A, Student B, and student N. During the same time period, Respondent had two (2) full-time TAs, Schneider and Marciano, and two (2)

part-time 1:1 TAs for Student B: Fenech in the mornings, who was replaced after two (2) weeks by Seligman, and Ryan in the afternoons. With a total of three (3) students in the class for the 2014/2015 school year, there were four (4) staff regularly in the classroom: Respondent, two (2) full-time TAs and one (1) part-time TA. T5173-5174.

Contrary to Respondent's contentions (T5047-5048, 5051-5053, 5185), the record shows she had sufficient space in the classroom, and sufficient staff, to utilize less restrictive, and less dangerous, alternatives to the bathroom for Student A. For example, Russo testified credibly that with only three (3) students in the class, either Student A or Student B could have been temporarily moved to another part of the classroom, or temporarily removed from the classroom. T923, 927, 984, 1132. The testimony of Respondent's witness, Reading Teacher Shari Steier, credibly corroborated this: "*. . . They used to take one of them [Student A or Student B] for a walk; they tried to take one of them out. And my door was open so I saw them walk down the hall a lot . . . A TA with Student A or a TA with Student B*." T3137-3139, at 3137-3138.

The testimony of Respondent's witness, Student B 1:1 TA Seligman, also corroborated this:

> *Q.* *And when the bathroom was not used any more [after Respondent's removal], what happened between Student A and Student B?*
>
> *A.* *All of the students were removed from the classroom. If Student B was having an issue, all of the students were removed from the classroom.*

T4223 (Direct examination).

. . .

> *Q.* *So they had a lot of options available in terms of having this kid [Student A] that was tantruming deescalate and the decision was made*

by the teacher [Respondent, prior to her removal] to choose a bathroom. That's your testimony?

A. Yes, sir.

T4232-4234, at 4234 (Cross-examination).

Thus, the record contains compelling evidence that readily available appropriate alternatives to using the bathroom for Student A existed during the Charge 1 time period. These included, but were not limited to, use of the classroom itself as a time out room, without the need to place Student A in the classroom bathroom.

Respondent's testimony that she used the bathroom to "*completely avert a crisis situation*" is not credible, and is against the weight of the credible evidence. T4852. Respondent's testimony that Student A self-selected going into the bathroom to self-soothe and avoid being bitten/attacked by Student B is not credible, and is against the weight of the credible evidence. T4871-4872, 5053. Schneider's testimony that in the midst of tantrumming Student A went into the bathroom because he was trying to avoid Student B is not credible, and is against the weight of the credible evidence. T4330-4331.

Respondent testified that Student B tried to attack Student E for noise reasons in the previous school year, but the attacks ". . . *never happened. Someone was always able to get there in time.*" Asked if Student B was able to get to Student A? [during the 2014/2015 school year], Respondent testified, "*Not while I was there, but evidently the day after I left, yes.*" T4850. This is not persuasive. The record establishes that during the charged school years, Students B and E were only together in Respondent's class

during the 2013/2014 school year – a year in which Respondent had *five (5) students* (B, D, E, H and N), and three (3) TAs. Charge 1 pertains solely to the 2014/2015 school year – a year in which Respondent had only *three (3) students* (A, B and N), and three (3) TAs. If "*[s]omeone was always able to get there in time*" to prevent Student B from attacking Student E in the 2013/2014 school year, with *five (5) students* in the class, the record provides no persuasive reason why someone ***wouldn't*** be "*always able to get there in time*" during the 2014/2015 school year, with *two (2) fewer students* than the year before and no reduction in number of TAs.

UNAUTHORIZED AND INAPPROPRIATE

As noted above, Respondent, with her Union representative and Natali present, stated to Cantore on November 17 that she was placing Student A in the bathroom as part of her isolation strategy, already in use. This was an unauthorized and inappropriate strategy and location.

Not Authorized by IEP of Student A

Student A's May 6, 2014 IEP (District Exhibit 2) notes his tantrumming behaviors. It states that a Behavior Intervention Plan ("BIP") is not needed. It makes no reference to using a bathroom for any behavioral purpose whatsoever. It does not suggest or authorize that Student A be placed in a bathroom for any behavioral purpose. It does not suggest or authorize that Student A be placed in a time out room.[24]

[24] The same is true of Student A's March 8, 2015 IEP (District Exhibit 3), subsequent to Respondent's November 2014 removal. Student A's mother (but not his father) was part of the CSE Program Review meeting which developed the March 8, 2015 IEP.

Student A's mother and father were both part of the CSE Reevaluation/Annual Review meeting which developed this IEP. Respondent sat in at this CSE meeting, where she met Student A's parents for the first time. T4831. Respondent testified that the parents actively participated in this CSE meeting. T4839. Respondent testified that though a translator was present at the meeting, the parents had no problem communicating in English. T4840.[25] The parents agreed that Student A's tantrumming behaviors were a common occurrence, which had not decreased. T4833, 4835.

Respondent was already aware of Student A's tantrumming prior to the May 6, 2014 CSE Annual Review. She had previously observed him in 5th grade West Elementary School class, for the purpose of deciding which Middle School special education class Student A would be placed in the following school year. During the observation Respondent saw Student A exhibit tantrumming behaviors "*[w]hen demands were placed on him . . .*". T4831-4832.

Respondent took detailed handwritten notes at Student A's May 6, 2014 CSE meeting (Respondent Exhibit 98; T4832, 4836-48). She noted Student A's tantrumming behaviors. Respondent's meeting notes list "Behavior Interventions", none of which include the bathroom. The only mention of the bathroom in Respondent's CSE meeting notes is that Student A is toilet trained. Respondent's notes make no reference to using a bathroom for any behavioral purpose whatsoever. They neither mention nor suggest that Student A be placed in a bathroom for any behavioral purpose. They neither

[25] The record establishes there was no material language barrier component with respect to Charge 1. T1097.

mention nor suggest that Student A be placed in a time out room or bathroom.

Respondent was asked on cross-examination:

Q. So in the fall of 2014 when A was in your classroom is it fair to say you did not request an FBA,[26] a BIP or a CSE meeting to address whatever issues there were that were causing Student A to be in the bathroom?

A. No, I guess actually I would say that's incorrect.

Q. Okay. So when did you request--

A. [Interposing] I definitely addressed the need for a CSE for a meeting to address his IEP.

Q. When did you do that, please?

A. We just went over it in the communication notebook.

Q. Was that in November 14th, 2014?

A. I believe so.

Q. And that's a day after Vinny Russo told you stop it.

A. Yes. It's not as though I hadn't been trying prior.

T5065-5066.

Actually, as discussed below, the record – particularly the communication notebook – establishes that it *is* as though Respondent hadn't been trying prior. Respondent's testimony is not credible.

Respondent argues it was her practice, and the District's practice, to implement a behavior plan to see if it worked before formalizing it. Respondent cites LBMS School

[26] Functional Behavioral Assessment, also referred to in the record as Functional Behavioral Analysis.

Psychologist Dr. Schlegel's re-direct testimony: Q. "And there is such a thing as an informal behavior plan?". A. "*Yes. We have behavior plans where we don't conduct a functional behavioral assessment where on any specific day here we discuss intervention and try to implement that intervention for a certain time and see if there are any changes. So, it's not always formally, a formal document.*" T3471.

For example, Respondent notes that "*Student G's time out plan was implemented before a formal plan was written and certainly before it was reflected on his IEP. (G's Mom2 2823.)*". Respondent Brief 35 [Emphasis in original]. Be this as it may, and to the extent such a practice may have existed, except for Respondent's use of the bathroom for Student A, the record is devoid of any informal behavior plan involving a *strategy of isolation*, *placing* a student into a *bathroom, alone, door closed,* and preventing the student from exiting by *holding the door closed against the student's will.* All of these were intentionally done to Student A, more than once, by Respondent and by staff at Respondent's direction, never with supervisory or parental knowledge or consent. Respondent's argument is therefore not persuasive.

Thus, neither Student A's IEP, nor the CSE process, gave Respondent any authority or permission to place Student A in the bathroom for behavioral reasons.

Not Authorized by Russo (or any other Supervisor/Administrator)

A bedrock of Respondent's defense is that Russo, her supervisor, authorized her use of the bathroom for Student A, and therefore she cannot be culpable for Charge 1. The record does not support this defense. The credible record evidence does not show that Russo, or any other supervisor or administrator, approved, authorized, or

consented to Respondent's proven conduct with respect to Charge 1.

The record shows that Respondent did not inform Russo of what she was *actually* doing with Student A and the bathroom. She did not inform Russo or any other supervisor or administrator that she was *placing* Student A in the bathroom, nor that he was *alone* therein, nor that he was *confined* therein. She did not inform Russo or any other supervisor or administrator of the existence of the social story.

Russo hired Respondent, seven (7) years earlier, and had been her supervisor every year of her employment with the District. She received excellent annual performance evaluations. Russo had the utmost faith in Respondent's abilities and judgment. The record shows that Russo had no basis to know or suspect what Respondent was *actually* doing with Student A and the bathroom. The record shows that Russo was surprised and taken aback upon learning what Respondent was actually doing. Indeed, Natali testified credibly that when Russo came to her about Respondent's use of the bathroom for Student A, "*He was upset and wanted it rectified.*" T4189.

In support of her argument that she had Russo's authorization, Respondent asserts that District Exhibit 15 contradicts Russo's testimony about when he opened Ragona's email sent to him on the evening of November 12. Respondent Brief 22, District Exhibit 15. Ragona testified credibly that she sent the email to Russo the evening of November 12, and that he did not reply that night. T1197. Russo testified credibly that he did not see the email until the next day, November 13. T933-936. District Exhibit 15 was admitted into evidence, without objection, as "Four pages of

emails between Ragona and Russo on November 11th and 12th, 2014." T1274. The exhibit contains several emails and email message headers, some dated November 11, some dated November 12. Some emails appear to have content, some appear to have no content. It is not clear which emails were sent when, nor which email content belongs with which email or email header, nor which emails have no content.

Though both counsel were at liberty to inquire, neither Ragona nor Russo were asked to explain or clarify the content, dates or sequence of the multiple emails and email headers contained in the exhibit. Therefore, the record regarding District Exhibit 15 is not sufficiently developed, nor sufficiently probative. To find in favor of Respondent's assertion would require the Hearing Officer to credit speculation instead of the credible testimony of two reliable witnesses. The Hearing Officer declines to do so.

Respondent contends that "*Russo repeatedly admitted that Respondent told him that time out was being used with Student A for behavioral reasons, and that Student A was going into the bathroom . . . Russo gave his explicit approval for the use of the bathroom . . .*". Respondent Brief 12. This mischaracterizes Russo's credible testimony to the contrary, which was that Respondent told him that Student A "*seemed to gravitate toward the bathroom*", "*work[ed] his way to the bathroom*", "*put himself into the bathroom*". T786-787, 918, 1129-1130. Respondent did *not* inform Russo that Student A was being *placed* in the bathroom (T918-919) – let alone inform Russo that Student A was being *placed alone and confined* therein. Contrary to Respondent's assertion, the record does *not* establish that Russo *"gave his explicit approval for the use of the*

bathroom."

Notably, Respondent's email to Russo on November 7 (2:04PM) stated only, *verbatim*:

> *Hi Vinny-*
>
> *I think we may need to have a program review for [Student A].*
> *My data does not reflect enough progress on goals IEP that were to be maintained over the summer in order to justify moving forward with current fall IEP goals.*
> *I think [Student A] may require some new goals that better reflect his current skill levels.*
>
> *Lisa* :-)

Respondent Exhibit 68.

Respondent testified on direct that she sent this email to Russo on November 7 because "*I wanted to add behavioral goals regarding the hand mouthing and the tantrumming and some of his academic goals appeared to us inaccurate*. . . .". T4900. Respondent testified on re-direct that this "*was an email discussing the fact that we needed to have a meeting with the parents to discuss the IEP that he [Student A] had come to me with because it appeared inaccurate and it did not reflect certain behavioral goals that needed to be addressed.*", and that those goals included Student A's tantrumming behavior. T5273. However, Respondent testified on re-cross-examination that "*Program review entails IEP goals and nothing to do with the bathroom*, . . ." T5316. Respondent's testimony is inconsistent with the record.

Substantial improvement in hand mouthing behavior was the subject of an extensive communication notebook entry home on October 9, yet, according to

Respondent's testimony, it is suddenly a subject of the November 7 email. Despite Respondent's email to her supervisor about a program review, Respondent sent no communication home in the days before or after November 7 requesting a meeting with the parents, nor regarding hand mouthing behavior, tantrumming behavior, any behavior-related problems, academic goals, nor Student A's IEP.

Respondent's November 7 email to Russo made no mention of the bathroom, nor tantrumming, nor tantrumming behaviors, nor Student A having any difficulties with any other student. None whatsoever, despite Respondent's contention that just the day before (November 6) she discussed with Russo Student A's "*slightly odd . . . running right into the bathroom*" (T4874-4875), purportedly because of Student B. Respondent's testimony that *". . . given Mr. Russo and my knowledge of [Student] B it made rational sense to us. And so he told me to carry on.*" (T4875) is not credible. However, Respondent's testimony does corroborate Russo's testimony that Respondent first mentioned Student A and the bathroom to him on November 12, not November 6. T919. It is undisputed that this email was sent on, and is dated, November 7. Yet, Respondent testified on direct that she sent this email *before* she had any conversation with Russo regarding use of the bathroom. T5273. Thus, Respondent's own testimony on direct contradicts her assertion that she spoke with Russo about the bathroom on November 6, and corroborates Russo's testimony that they had the conversation on November 12.

This out-of-the-blue email sent by Respondent to her supervisor Russo on November 7, regarding a *possible* need for a program review about "*progress on goals*

IEP that were to be maintained over the summer in order to justify moving forward with current fall IEP goals." – two (2) full months after the school year began, but just one (1) hour and 14 minutes after Respondent's 12:50 PM text message (Respondent Exhibit 102) to Ragona in the exchange started by Ragona because of concern with Respondent's use of the bathroom for Student A's tantrumming – seems calculated to provide Respondent cover in light of her being questioned in school and by text message the previous day (November 6) by Ragona about use of the bathroom for Student A. Respondent's testimony that this was "*a pretty standard email*" (T5273) is not credible.

Additionally, Respondent testified that tantrumming was one of the behavioral goals she had in mind in her November 7 email to Russo. T4900. It does not make sense that same would not be discussed at the November 12 team meeting – a meeting which was called *because of* Respondent's use of the bathroom for Student A's tantrumming. Yet, Respondent testified on direct that the goals she wanted to revise were *not* discussed at the November 12 team meeting. T4904.

Respondent's arguments attacking Russo's credibility and motivations are not persuasive. Respondent Brief 21-23. In particular, as discussed above, the record reflects that Respondent first approached Russo about the unusual matter of Student A and the bathroom on November 12, not on November 6. Thus, it was not unreasonable for Russo to have thought about the conversation overnight and send an email to Respondent the next morning (November 13) stating, in part, he was not sure if he heard correctly about Respondent's plan for Student A time outs in the bathroom.

District Exhibit 12. The Hearing Officer disagrees with Respondent's interpretation that "last nite" in the email refers to when their conversation took place. Rather, the Hearing Officer finds that "last nite" refers to when Russo was thinking about the conversation -- a conversation which took place the previous day, not six (6) days previously.

Consequently, the record reflects that it was not unreasonable for Russo to surmise that this new, "*kind of a strange*" and "*rather odd*" (T786-787, 1130) matter he learned of the day before was the "*important matter"* Ragona and Ceileski wanted to discuss with him on November 13. Also, the record corroborates Russo's testimony that his November 13 emails to Respondent, about discontinuing use of the bathroom for Student A's time outs (District Exhibits 12 and 13), were in keeping with his reasonable intent to not undercut her authority as "captain of this classroom team". T538, 792-793, 944, 1119-1120, 1131; Respondent Exhibit 1F.

Additionally, Respondent maintains it was during this first conversation about Student A and the bathroom that Russo "approved" using the bathroom for Student A's time outs. If the conversation took place on November 6, one would reasonably expect Respondent to have stated Russo's purported approval in the group text message exchange that undisputedly began after school on that very same day – November 6. Notably, however, the text message exchange contains no such statement of approval. Respondent Exhibit 102. Neither did Respondent's email to Russo on November 7. This is again consistent with Russo's testimony that Respondent first approached him about Student A and the bathroom on November 12, not on November 6.

Respondent's November 7 email (Respondent Exhibit 68) to Russo, her supervisor, contrasts sharply with her text message exchange less than 24 hours earlier, with non-supervisor team members Ragona and Ramsey (Respondent Exhibit 102). Ragona initiated the exchange, which is set forth below, *verbatim*:

> Thursday November 6, 2014:
> Ragona 17:13:04: *I've been thinking about the current plan you shared with me for [Student A] for when he's having a meltdown and I'm concerned about safety in the bathroom when he is tantruming with all the hard surfaces. Is there a way to designate an area of the [class]room as the calm down corner or area to regroup?*
>
> Respondent 19:09:39: *Currently he is not engaging in self injurious behavior and everything is removed from the bathroom so he cannot hurt himself*
>
> Respondent 19:09:42: *The behavior is gain control and therefore needs to be ignored*
>
> Respondent 19:10:07: *It is not fair for the other students in the room to listen to the tantruming for long periods of time*
>
> Respondent 19:10:24: *Especially [Student B] who becomes aggressive when he's around disturbing noises*
>
> Respondent 19:10:41: *Obv if Student A becomes self injurious we will need to revisit it*
>
> Ragona 19:11:20: *Ok*
>
> Respondent 19:11:50: *But I don't predict that happening*
>
> Respondent 19:15:18: *as individualized as my class is, ethically I still need to consider the other students in the class when I develop a bip*
>
> Friday November 7, 2014:
> Ragona 12:28:50: *If we could set up a team meeting to go over stuff that would be awesome I'll try to make myself available whenever u can*
>
> Respondent 12:50:09: *Sure - lets talk Monday and try to find a date that works*

Respondent Exhibit 102.

Respondent's text messages to non-supervisors Ragona and Ramsey did not dispute or deny Ragona's initial text message statement that Respondent had a *current plan* to use the bathroom for Student A's "*meltdown*[s]" and "*tantrumming*". Indeed, Respondent's responses confirm the accuracy of Ragona's statement, and corroborate Ramsey's testimony.

Respondent asserts that "*Although Ragona had texted Respondent about the use of the bathroom on November 6th, there was no indication that she had any issue with it Respondent explained what she was doing and Ragona responded 'OK' (R Ex. 102.) The following day when Ragona suggested a team meeting, she said it was to 'go over stuff' and did not indicate any displeasure or urgency. (R Ex. 102.)*" Respondent Brief 19-20, *see also* 13-14. This assertion is against the weight of the evidence. The very reason Ragona initiated the text message exchange, which led to the team meeting, was Ragona's serious concerns about Respondent's use of the bathroom for Student A, which Ragona first learned about that morning. Ragona's initial text message initiating the exchange explicitly stated: "*I'm concerned about safety in the bathroom when he is tantruming with all the hard surfaces*".

Respondent's witness Ramsey testified credibly that "*Ms. Weitzman told me that she was experimenting with a behavioral plan for Student A where if he demonstrated noncompliance when given an academic task--this is my recollection of it--he would be prompted to go into the bathroom.*" T3808 [Emphasis added]. In response to his being told this by Respondent, Ramsey testified credibly that on November 12, prior to the

team meeting that day:

> *When she told me of the plan I pointed out and suggested that she have a program review with a formalized plan that the parents signed off on prior to putting in the plan, and* ***she told me that she had the consent of our chairperson Vinnie Russo, that he was aware of it, and that we were going to be meeting with the family to have a program review in the near future*** *of this conversation that we had which I anticipated there was some discussion and I can't remember whether or not there was communication with the family but there was--I was aware that we were going to have a program review to look at his goals 'cause he was a new student to us and we were trying to decide whether or not the goals--we weren't sure whether or not the goals that he had come in with were appropriate for where he was when he came to us. So that--you know, so* ***within that conversation she told me that she had consent of--from Vinnie Russo or that he knew about it.***

T3809-3810 [**Emphasis** added].

Ramsey's testimony about Respondent's "*experimenting*" with the bathroom for Student A's *"demonstrated noncompliance when given an academic task"* was corroborated by Respondent's testimony that, ". . . *the second time, the second day that* ***we introduced a non-preferred task*** *I knew it was going to happen. I specifically made it a point to stay with A, so that I could see what he was going to do and where he was going to go. . . .".* T4853 [**Emphasis** added].[27]

Russo testified credibly that on November 14 Respondent informed him that Student A was not alone in the bathroom, and informed him that the door was kept ajar. T1142. However, as discussed above, the record establishes that Respondent misinformed Russo.

---

[27] Thus, the availability of dividers would not have made a material difference. The undisputed stimulus for Student A's tantrumming behavior was him being given a non-preferred task, not external sensory stimuli which dividers might diminish (T4847), albeit with limited, if any, effectiveness. T4544; 4336-4340.

Thus, the record establishes Respondent misled and failed to inform Russo, or any other supervisor or administrator of her actual use of the bathroom for Student A. Under such circumstances, Respondent's claim to have had school-based approval or consent for same cannot succeed. Russo did not consent to that which he did not know. Similarly, Respondent misled colleagues and subordinates by attempting to persuade them that she had Russo's approval for what she was actually doing, when the record shows she did not. This is compelling evidence of Respondent's awareness of wrongdoing.

Not Authorized by Student A's Parents

Additionally, the record establishes that Respondent misled and did not inform Student A's parents, at all, of her use of the bathroom for Student A. This is further compelling evidence of Respondent's awareness of wrongdoing.

At the November 12 team meeting Respondent misleadingly stated to the team that she had notified the parents through the communication notebook that she would be trying a number of strategies to work on Student A's behavior, and that the parents were okay with it. T1195. Only when Ragona, still during the team meeting, asked Respondent specifically if the parents gave permission for the bathroom did Respondent acknowledge that there was not parental permission to use the bathroom. T1195-1196.

Ramsey testified credibly that at the team meeting Respondent admitted Student A's parents were not aware of what Respondent was doing with their son. T3846. Student A's mother only found out at her meeting with Cantore on November 24, after

Respondent's removal. Student A's mother testified she was "*very surprised because all of the notes indicated that he was always doing well.*" T2248. Student A's mother's testimony is consistent with Cantore's testimony about their meeting on November 24. Cantore testified that when she made reference to Student A having been placed in the bathroom, the mother's reaction was that "*She didn't know he was having difficulty.*" T1755.

The "notes" Student A's mother referred to were Respondent's communication notebook entries. District Exhibit 17 is the communication notebook between Respondent and Student A's parents for the 2014/2015 school year. It consists of a bound Mead Composition "marble cover" ruled notebook. Respondent acknowledged that other than this communication notebook, she had no communication with Student A's parents during the time period of Charge 1. There were no telephone calls, text messages, or emails. The Code of Conduct requires that "*Teachers . . . 6. Communicate regularly with students, **parents** and other teachers concerning growth and achievement.*" Respondent Exhibit 54, p. 6 [**Emphasis** added].[28] Thus, the communication notebook is a critical document.

Examination and analysis of the communication notebook entries reveals compelling evidence in support of the charge, and severely undercuts the credibility of Respondent's testimony and version of events. These entries are discussed below.

---

[28] The Hearing Officer notes that the communication notebook is not the subject of an independent or specific charge, and it therefore has not been considered as such.

Respondent wrote 30 notes to Student A's parents during the time period of Charge 1. These notes were written on September 3, 4, 5, 8, 12, 16, 17, 23, 24, 29, and 30; October 1, 7,[29] 8, 9, 14, 17, 20, 23, 24, 28, 29, 30, and 31; November 3, 6, 7, 10, 14, and 17. Some notes were handwritten on the notebook pages, others were typed computer printouts affixed to the notebook pages.

Except for the week of November 17 (Respondent was relieved of classroom duties on November 18), Respondent wrote at least two (2) notes to Student A's parents in the communication notebook each school week of the 2014/2015 school year, as illustrated in the following table:

[Remainder of this page blank, to avoid dividing the following Analysis Table]

[29] The October 7 note to Student A's parents was written by Schneider, not Respondent. It stated, in full: "*Just a reminder tomorrow is a pool day*."

Analysis Table, Communication Notebook (District Exhibit 17):

2014/2015 School Year: School Week #	School Week Commencing on Monday, 2014	Respondent's Notes to Student A's Parents in Communication Notebook (District Exhibit 17)	
		Total # of Notes from Respondent to Student A's Parents	# of Notes to Student A's Parents Referring to ***Bathroom; Time Out; Tantrum(s); Noise; Social Story; and/or Any Conflict(s) Between Student A and any other student***
1	September 1	3	**0**
2	September 8	2	**0**
3	September 15	2	**0**
4	September 22	2	**0**
5	September 29	3	**0**
6	October 6	3	**0**
7	October 13	2	**0**
8	October 20	3	**0**
9	October 27	4	**0**
10	November 3	3	**0**
11	November 10	2	**0***
12	November 17	1	**0**
	Totals:	**30**	**0**

* During the week of November 10, Respondent's note to Student A's parents on Friday, November 14, stated, in pertinent part, "*Additionally, I would also love the opportunity to discuss with you some of the different interventions that might be able to help with some of his more challenging behaviors*." Respondent gave Student A's parents no definition or description of what these "challenging behaviors" might be, nor any sense of urgency. Notably, Respondent maintains that use of the bathroom for Student A's

time outs was *successful,* as of the first week of November. Therefore, it is inconsistent with Respondent's own claim – and the record – for her November 14 note to speak *conditionally* of interventions that *might* be able to help with more challenging behaviors.

The only other notes in the communication notebook referring to *any behaviors* are September 12 and October 9. These refer only to Student A's "*behavior of putting his hands in his mouth*". It is clear from the record that this is not one of the "challenging behaviors" Respondent referred to in her November 14 note to Student A's parents. None of the 28 prior notes referred to any negative behaviors, or any behavioral issues at all (other than Student A's unrelated hand mouthing) – until November 14, 2014.

None of these *30* notes home mentioned *time out* in *any* manner or context whatsoever. *None* mentioned the *bathroom* in *any* manner or context whatsoever. *None* mentioned *tantrum(s)*, or an increase in tantrumming, in *any* manner or context whatsoever. *None* mentioned Student A *making any noise* in *any* manner or context whatsoever. *None* mentioned *any conflict(s), of any type*, *with any students* (named or unnamed), in *any* manner or context whatsoever. *None* mentioned the *social story, or its contents,* in *any* manner or context whatsoever.

Notably, Respondent's October 9 note *did* discuss a behavioral matter. It was a relatively lengthy and detailed communication about progress with Student A's hand mouthing behavior. Respondent wrote, in full, *verbatim*:

> *I just wanted to let you know that [Student A] had a wonderful day in school today!*

> *When [Student A] first came to the Middle School, I started taking data on how many times student a put his hands in his mouth during the school day. On average, this behavior occurred approximately 150 times a day. Today, [Student A] started working on a behavior plan that I created to help decrease this behavior. [Student A] responded extremely well to the plan and only attempted to put his hands in his mouth 17 times today! Amazing! I was very proud of him and you should be too! As I said before, I think [Student A] is going to have a wonderful year and will have a lot of success in the Middle School!!!!*
>
> *Have a great night!*

District Exhibit 17.

Respondent typed the above 131-word note to Student A's parents on October 9, regarding the reduction of hand mouthing behavior, *on the very same day that this "amazing" change in behavior occurred*. This begs the question: Why wasn't there *any* note to Student A's parents about Student A's purported self-selection of the bathroom on November 5 and/or November 6? – the dates on which Respondent alleges Student A first self-selected going into the bathroom.

Respondent testified regarding Student A going into the bathroom: ". . . *that's great. That's tremendous for my students, that's to get to a place where they want to self-soothe alone huge.*" T4856. "*And for my students that he had that skill was incredible*." T5054. Respondent wrote in the above October 9 note that the reduction in the hand mouthing behavior was *". . . Amazing! I was very proud of him and you should be too! . . .*". Although Respondent testified she did not personally observe Student A self-select the bathroom on November 5, Respondent testified she was informed of it by Schneider moments after it happened, while Student A was still in the bathroom. T4851. Therefore, if this was the case – as Respondent maintains it was – why was

there no communication notebook entry to Student A's parents on November 5, at all? – even though Respondent's behavioral data entry for November 5 states that at 10:10 AM Student A had a *seven (7) minute* "Time-Out / social story". Respondent Exhibit 99. Respondent testified that this time out was in the bathroom; Respondent Exhibit 99 does not contain time out location information.

Respondent testified that the very next day, Thursday, November 6:

> *I specifically made it a point to stay with A, so that I could see what he was going to do and where he was going to go. Wanted to confirm Ms. Schneider's report or not. One way or another. And sure enough he ran right past the chair he was typically directed to and into the bathroom and sat down.*

T4853.

Yet, despite this "confirmation" of a purportedly "*great*", "*tremendous*" and "*huge*" behavioral development, and the logging of a *ten (10) minute* "Time-Out / social story" at 1:15 PM (Respondent Exhibit 99; Respondent testified that this time out was in the bathroom), Respondent's November 6 note to Student A's parents consisted solely of: "*Thank you for sending back the permission slip and $! I will send your $3 change back tomorrow!; ♡ Lisa =*)". Again, no mention to the parents whatsoever of Student A's purportedly "*great*", "*tremendous*" and "*huge*" achievement of bathroom self-selection.

Even the following day, Friday, November 7, Respondent's 72-word typed note to Student A's parents consisted solely of:

> *Good Afternoon!; [Student A] had a great time on the trip today! He sat at the table very nicely and was very happy!; I know you said [Student A] would probably want to order chicken fingers, but he was very excited to order macaroni and cheese so we let him. He ate the whole bowl with a big smile ☺;*

I have enclosed the $3 change I owed you.; Have a great weekend!; Lisa ☺

District Exhibit 17.

Yet again, for three (3) days in a row, no mention whatsoever of Student A's purportedly "*great*", "*tremendous*" and "*huge*" achievement of bathroom self-selection on both of the two previous days.

The following Monday morning, at 8:00 AM on November 10, Student A had a *six (6) minute* "Time-Out / social story". Respondent Exhibit 99. Respondent testified that this time out was in the bathroom. Yet again, this was not communicated to Student A's parents. Respondent's November 10 note to Student A's parents consisted solely of: "*No School tomorrow!; Pool on Wednesday!;* ♡ *Lisa* =)".

On the next school day, at 8:05 AM on Wednesday, November 12, Student A had another "Time-Out / social story". This time out lasted *seven (7) minute*s. Respondent Exhibit 99. Respondent testified that this time out was in the bathroom. Yet again, there was no communication, at all, to Student A's parents on November 12, or November 13.[30]

Incredibly, this purportedly "*great*", "*tremendous*" and "*huge*" *positive* bathroom self-selection and self-soothing behavioral achievement/progress did not rate a note, *any* note, home to Student A's parents – *ever*. Surely, such progress was at the very least as positive and important as the hand mouthing behavioral progress that rated an extensive 131-word communication from Respondent to Student A's parents on October

[30] It is undisputed that Respondent did not work on November 13.

9 – on the very day that it happened.

In fact, not until Friday, November 14, did Respondent communicate whatsoever to Student A's parents that their son might have *any* behavioral issue (other than hand mouthing). It is not happenstance that Respondent wrote this note to Student A's parents on the very same day that Russo met with her first thing in the morning to discuss her use of the bathroom for time outs for Student A.

Respondent's November 14 note to Student A's parents states, in full, *verbatim*:

Hi Mr and Mrs. [surname redacted]

I hope that [Student A] is feeling happy and welcomed at the Middle School and that you are both happy with his experiences here! As I said before, I think [Student A] is a very smart boy with a lot of wonderful qualities and I think he will be very successful here at the Middle School! I am very excited to see how much he grows and learns over the next three years!

Now that I have finished properly assessing [Student A] I was wondering if we could have a quick meeting to go over my results. Maybe we could try to meet during the last week in November? Would that work for you? There are a few goals on [Student A]'s IEP that I would like to discuss possibly changing with you, in order to give [Student A] more opportunities here at the Middle School! I could tell from the very first day of school that [Student A] likes to interact with his peers, so I am also hoping that we can discuss some ideas I have that I think would help give [Student A] more opportunities to socialize with his peers here.! Additionally, I would also love the opportunity to discuss with you some of the different interventions that might be able to help [Student A] with some of his more challenging behaviors.

Please let me know if the last week in November will work for both of you to come in for a quick meeting and if there is specific day or time (morning or afternoon) that would work best for you!

I hope you have a wonderful weekend!

[Student A] is doing great and I absolutely adore him!

Lisa ☺

District Exhibit 17.

Incredibly, despite the urgency and physical danger Respondent alleges Student A's tantrums were causing him with respect to provoking attacks upon himself from Student B, and the alleged resulting use of the bathroom for Student A's protection from Student B – none of which was mentioned in Respondent's November 14 (or any other) note – there is *no urgency* in Respondent's request to meet with Student A's parents. Though written in the middle of November, Respondent asks to meet "*during the last week of November*". In 2014, the last weekday of November was Friday, November 28, the day after Thanksgiving.

Respondent's observation data (Respondent Exhibit 99) shows that Student A tantrummed frequently in September and October. Though Student A's parents were already aware of their son's tantrumming, and it was on his IEP (District Exhibit 2), Respondent did not communicate any change in tantrumming behavior, or anything that stated, indicated or suggested that the use of time out, or the bathroom, was needed, being considered, or occurring. A side-by-side comparison of Respondent's recorded data of Student A's tantrumming, with Respondent's communications to Student A's parents on the same respective day, is illuminating, and further undercuts the credibility of Respondent's testimony and version of events:

[Comparison Table begins on next page]

Table Comparing Student A tantrumming behavior, as defined and recorded by Respondent, to Respondent's communications to Student A's parents on tantrum days:

"*Student A* *Behavior:* ***Tantruming (screaming, crying, lying/rolling on the floor, kicking)*** [**Emphasis** added]. *Frequency and Duration Data*" (Respondent Exhibit 99)				Respondent's Note to Student A's Parents in Communication Notebook (District Exhibit 17)
Tan-trum Date (2014)	Tan-trum Time	Tan-trum Freq-uency	Tantrum Duration (Approx. Minutes)	Communication Notebook Entry from Respondent to Student A's Parents
9/9	8:10A	1	30	[No note home]
9/11	8:30A	1	21	[No note home]
9/15	8:07A	1	34	[No note home]
9/18	10:25A	1	26	[No note home]
9/19	9:40A	1	28	[No note home]
9/22	1:30P	1	32	[No note home]
9/29	8:05A	1	42	*I hope everyone had a nice long weekend!* *I still cannot find the missing sweatshirt :-(Can you please describe what it looks like, so I have a better idea of what I am looking for? What color is it? Does it have a hood or zipper? Is there any special design on it? I am really sorry that it has been misplaced, but I am sure we will find it!* *Tomorrow, Tuesday, September 30, is the first day of after-school. Afterwards, [Student A] will be going home on the 4:30 bus.* *Please feel free to write back in this book OR call or message me at: [phone number redacted]. You can also email me at: [email address redacted].*

Tantrum Date (2014)	Tantrum Time	Tantrum Frequency	Tantrum Duration (Approx. Minutes)	Communication Notebook Entry from Respondent to Student A's Parents
10/1	8:05A	1	25	*Thank you so much for writing!* *I am so happy that you and [Student A] are happy!* *You are absolutely correct, [Student A] is very loved and understood in the his new school!* *I adore [Student A] and think he is very smart and capable! I think he will be very successful at the Middle School!* *We found his missing sweatshirt!!! I am sending it home in [Student A]'s backpack today!* *Thank you for the description and your patience as we tried to find it :-)*
10/6	8:10A	1	27	[No note home]
10/7	8:15A 10:20A	2	12 20	*Just a reminder tomorrow is a pool day.* *[written by] J. Schnieder*
10/8	12:10P	1	26	*[Student A] had a great time at the pool today! Thank you for remembering to send in his pool stuff!* *I am sorry I didn't write yesterday. I was out all day at a conference. But, I was very happy to see [Student A] back in school today and feeling better! We missed him on Monday :-(*
10/14	8:05A	1	29	*I hope you had a nice long weekend! Some teachers from the Middle School saw [Student A] at the Fall Festival and said he was dressed in costume as Thor! How adorable! I hope you had a great time at the festival and on the rides!* *Student A had a great day back at school today! We went on the playground in after-school and [Student A] had a great time on the swings and the slides!*
10/16	8:10A	1	24	[No note home]

Tan-trum Date (2014)	Tan-trum Time	Tan-trum Freq-uency	Tantrum Duration (Approx. Minutes)	Communication Notebook Entry from Respondent to Student A's Parents
10/17	8:10A	1	27	*Have a wonderful weekend!*
10/20	12:40P	1	28	*I am so glad that [Student A] had such a fun time at the festival with you, his dad and sister! That is so nice that you all went together as a family. And how exciting that [Student A] got to walk in the parade! I am sure that everyone loved seeing him in his cape as much as he loved wearing it! If you have a picture of him in his costume — we would love to see it! [Student A] must have also been so happy to see his sister! I hope she is doing well at college!* *Thank you for sending back the permission slip for Waldbaum's. Our first trip will be this Friday.* *I hope you are having a nice Monday!* *[Stu. A] had another great day in school today. :-)*
10/23	10:20A	1	30	*I hope you like [Student A]'s school picture! I think he looks adorable!! What a handsome young man :-)* *I also just wanted to remind you that tomorrow is our first trip to Waldbaum's. Please send in money and a shopping list for [Student A].* *Have a good night!*
10/27	8:05A 2:05P	2	21 16	[No note home]
10/29	8:10A	1	23	*[Student A] had a <u>great</u> time at the pool today :)*
10/31	8:15A	1	26	*Happy Halloween!!*
11/3	8:00A 11:40A	2	5 3	*Pool on Wednesday!!* *No school tomorrow. :)*
11/5	10:10A	1	3	[No note home]
11/6	1:15P	1	7	*Thank you for sending back the permission slip and $! I will send your $3 change back tomorrow!*

Tan-trum Date (2014)	Tan-trum Time	Tan-trum Freq-uency	Tantrum Duration (Approx. Minutes)	Communication Notebook Entry from Respondent to Student A's Parents
11/10	8:00A	1	10	*No School tomorrow! Pool on Wednesday! :)*
11/12	8:05A	1	7	[No note home]
11/14	8:20A	1	3	*I hope that [Student A] is feeling happy and welcomed at the Middle School and that you are both happy with his experiences here! As I said before, I think [Student A] is a very smart boy with a lot of wonderful qualities and I think he will be very successful here at the Middle School! I am very excited to see how much he grows and learns over the next three years!* *Now that I have finished properly assessing [Student A] I was wondering if we could have a quick meeting to go over my results. Maybe we could try to meet during the last week in November? Would that work for you? There are a few goals on [Student A]'s IEP that I would like to discuss possibly changing with you, in order to give [Student A] more opportunities here at the Middle School! I could tell from the very first day of school that [Student A] likes to interact with his peers, so I am also hoping that we can discuss some ideas I have that I think would help give [Student A] more opportunities to socialize with his peers here.! Additionally, I would also love the opportunity to discuss with you some of the different interventions that might be able to help [Student A] with some of his more challenging behaviors.* *Please let me know if the last week in November will work for both of you to come in for a quick meeting and if there is specific day or time (morning or afternoon) that would work best for you!* *I hope you have a wonderful weekend!* *[Student A] is doing great and I absolutely adore him!*

Tan-trum Date (2014)	Tan-trum Time	Tan-trum Freq-uency	Tantrum Duration (Approx. Minutes)	Communication Notebook Entry from Respondent to Student A's Parents
11/17	8:10A 10:30A 1:10P	3	5 25 10	*(1) Please see my note from last Friday.* *(2) Pool on Wednesday — please send in bathing suit and towel.* *(3) Waldbaum's trip on Wednesday please send it shopping list and money.*

As this table illustrates, according to Respondent's recorded observation data, most of these tantrumming incidents happened in the morning. The afternoon incidents did not occur near the end of the school day. Therefore, the record contains no reason why Respondent would not have had time to write a communication about tantrumming or related behaviors to Student A's parents on at least some, or *any* of the purported bathroom self-selection days. Respondent's explanation that "*I can't communicate everything under the sun. I've got six other students.*" T5054 is not credible. It is undisputed that Respondent had only *three (3)* students during the 2014/2015 school year, not six (6). Assuming that Respondent misspoke, and meant to say "*three*" rather than "*six*" students, the testimony is still not credible. Her testimony that *"I didn't--I did not always write in the communication notebook. I tried my best to be as up to date as possible, but sometimes it didn't happen.*" is not credible. T5048.

Despite the great weight Respondent placed on data collection of Student A's tantrums – defined by Respondent as ***"screaming, crying, lying/rolling on the floor, kicking"***, Respondent Exhibit 99 [**Emphasis** added], Respondent did not *ever*

communicate about tantrums (or any similar or component behaviors), or any change or increase in the content or frequency of such behaviors, to Student A's parents. As the table shows, of the 26 days that Respondent logged tantrums on Respondent Exhibit 99, on 11 days there was *no* communication to Student A's parents, *at all*. On the other 15 logged tantrumming days there was a communication to Student A's parents, but *none* of the communications contained *any* mention of tantrums or related behaviors, or time outs, or the bathroom, *at all*. The comparison table above fully quotes Respondent's communications to Student A's parents on these 15 of 26 recorded tantrumming days. Clearly, Respondent's communications dealt solely with less significant, non-behavioral matters.

Notably, Respondent's data collection (Respondent Exhibit 99) does not provide any data about the ***location*** of *any* time out.[31] Though the phrase "*time out*" is written on a number of dates in the document, the word "bathroom" does not appear, *anywhere*. The document gives a reader *no indication of where* the referenced time outs took place. Considering the great importance and achievement Respondent ascribed to Student A's purported self-selection of the bathroom, the absence of time out ***location*** data, and particularly ***the complete absence of the word "bathroom" anywhere in her data collection***, constitute further compelling evidence of Respondent's awareness of wrongdoing.

[31] Except for November 17 – the day Respondent was interviewed about her use of the bathroom for time outs for Student A. The entry is "*sitting in chair*", without providing the location of the chair.

Respondent Exhibit 99 states "ignoring" and "social story" for Student A's tantrums on October 27, 29 and 31. One reasonably wonders why these tantrums by Student A could be safely "ignored", without Student B being triggered to attack Student A. If, as Respondent alleges, Student A's tantrums in November triggered Student B to attack Student A, Respondent has not provided credible or persuasive evidence why previous tantrums recorded by Respondent – *defined by Respondent* as ***"screaming, crying, lying/rolling on the floor, kicking"*** – would not also have triggered Student B to attack Student A. For example, Respondent recorded that Student A's tantrums were ignored for *21 minutes* and *16 minutes* on October 27; ignored for *23 minutes* on October 29; and ignored for *26 minutes* on October 31. As found above, Respondent's assertion that "*B held it together*" but could no longer do so (T4849-4850), is not credible.

Respondent testified that on November 3 Student A had a 29 minute tantrum, not in the bathroom, ". . . *and that was the day that we--that was the day that we really figured out that B was going after him* . . .". T4853-4854. Despite figuring this out on November 3, Respondent wrote no note to Student A's parents about it on November 3, or ever.

Respondent testified that on November 5 Student A ran into bathroom – purportedly for the first time – because "*Student B came within four inches of biting him,* . . ." T5040. Yet, she wrote no note home to Student A's parents about this incident on November 5, or ever. Even Respondent's last note to Student A's parents, on Monday November 17, states only, in pertinent part: "*Please see my note from last Friday.*"

Again, no mention of tantrums, any change in tantrum behaviors, the bathroom, time outs, or conflicts with any students, named or unnamed.

Respondent testified that regarding Student A and the bathroom, she ". . . *attempted to communicate several times in the communication notebook to get a conversation going between what was going on at home and what was going on at school I think this behavior would have made a lot more sense to Mr. Russo and I if we had known it was occurring a month prior at home*." T5007-5008. "*The parents knew that I was experimenting with different interventions, and I would not have specified each specific one as I did it. That's part of doing the experimentation. . . . I had written in the communication book. I can't say that they knew. I had written it in the communication book*." T5041-5044, at 5041-5042. None of this testimony is credible, and is completely unsupported by the communication notebook entries (District Exhibit 17), as illustrated in the foregoing tables.

Respondent did not send *any* such communication until November 14 – the day *after* Russo told her to stop. As discussed above, her testimony that she ". . . *had attempted sooner than that I recall . . .*" (T5008-5009), and, "*It's not as though I hadn't been trying prior.*" (T5066) is not credible.

Respondent testified that she would *not* have communicated to Student A's parents that their son was going into the bathroom because of behavioral issues, soothing issues or to protect himself from Student B, because, ". . . *that's not something that I typically would have done*." T5050. This testimony is not credible. Asked immediately thereafter if she thought this information was sufficiently important to let

Student A's parents know, Respondent testified, "*Oh, I did and why that's why I set up the meeting.*" Confronted with the fact that she was referring to her November 14 communication notebook entry – the day after Russo said to stop using the bathroom, Respondent testified unpersuasively, "*I asked for a meeting in September in the communication book. It's not as though I was avoiding meeting with these parents altogether. I wanted to meet with them.*" T5051.

Notably, the September communication notebook entry to which Respondent referred was on September 8 – the beginning of the school year. Respondent's entry, "*hoping we could have a team meeting*", could not possibly have had anything to do with Student A's purported going into the bathroom for behavioral reasons, such as to self-soothe, to feel safe, or to protect himself from Student B, *as none of these things occurred according to Respondent's own version of events until two (2) months later*, in the first week of November. T5070. Respondent testified this was important enough to communicate to the parents, but she did not do so when – again, according to Respondent – Student A purportedly did so on November 5, 6, 10 or 12. Respondent's explanations are not credible.

Furthermore, overall analysis of Respondent's entries in the communication notebook reveals that Respondent *misled* Student A's parents. Respondent's communications to Student A's parents gave no indication of any behavioral issues (other than hand mouthing). Quite the opposite: Respondent's entries painted a positive, rosy picture of how well Student A was doing. Respondent's communication notebook entries gave *no indication whatsoever* of new or changed tantrum issues,

screaming issues, conflict with any students, use or consideration of using time outs, use or consideration of using the bathroom for any behavioral reasons, or any significant problems at all.

Despite painting this rosy picture to Student A's parents from September through November, in her defense Respondent attempts to shift blame to the parents. Respondent asserts that Student A's parents did not communicate often enough with Respondent. Respondent Brief 18-19. This is unpersuasive. Notably, for more than two (2) months, Respondent made *no effort* to follow-up on her generic September 8 (*i.e.*, beginning of school year) communication to the parents, "*hoping*" for a team meeting.

As discussed above, Respondent also attempts to shift blame to Russo. Respondent Brief 12-13. Respondent and Russo discussed Student B's response to Student A's behaviors, but Russo testified credibly that ". . . *it was no more than a typical year in terms of the behaviors at the beginning of the school year*." T906. The record reflects that if there was substantial behavioral change, to the extent that Student A was in physical danger from attack by another student – as Respondent purports was the case – one would reasonably expect Respondent to promptly bring it to the attention of Student A's parents in the communication book, or make a phone call to the parents, or make a request for assistance in contacting the parents. But, Respondent did *none* of these things. Not promptly, not at all. Respondent's explanations in this regard are not credible. T5041-5050.

The record establishes Respondent intentionally and materially misled her supervisor, and Student A's parents. Thus, Respondent cannot successfully claim that

she had the authorization, permission, consent or approval of her supervisor, or of Student A's parents, to place Student A in the bathroom for behavioral reasons.

The Hearing Officer credits Cantore's testimony that teachers are not permitted to have a student sit alone in a bathroom until they stop crying (T1470), and that Respondent had no approval or authority to have Student A sit alone in the bathroom until he stopped crying (T1471). The Hearing Officer credits Russo's testimony that Respondent was not authorized to place Student A in the bathroom for time out. Russo testified credibly on direct that placing a student in a bathroom as a time out room reflects poor judgment for a teacher (T1116), and credibly on cross-examination that "*. . . [Respondent's] judgment in use of the bathroom as a timeout room was very poor. I didn't really have to say very much, because when I did she presented as extremely remorseful. So I believe she understood the gravity of the situation.*" T948.

Thus, the record establishes that Respondent did not have any authority or permission to place Student A in the bathroom, and that Respondent knew or should have known this, but did so anyway.

ENDANGERED THE HEALTH, SAFETY AND WELFARE OF STUDENT A

Inherent Dangers of a Bathroom

Respondent failed to heed the inherent dangers present in the classroom bathroom. As discussed above, these include the bathroom's ceramic tile floor and ceramic tile walls, water-filled toilet, sink, exposed plumbing, mirror, bars and metal garbage receptacle with jutting corners, described above. Placing a mat on the bathroom floor did not materially reduce these inherent dangers.

Such dangers are magnified when a student is tantrumming, and when the student is intellectually disabled. Such dangers are increased by orders of magnitude when the student is in the bathroom alone without visual observation, and confined therein.

Obvious Risk of Injury to Tantrumming Child Alone/Isolated/Confined in Bathroom

That, according to Respondent's text message (Respondent Exhibit 102), she believed Student A was "*[c]urrently . . . not engaging in self injurious behavior and everything is removed from the bathroom",* does not support Respondent's opinion of *"no risk of injury*" to Student A when placed in the bathroom alone for tantrumming. Nor did it give Respondent permission, authority or justification to do so. This also demonstrates Respondent's poor judgment.

Respondent did not explain how she or staff could prevent Student A from injuring himself on any of the inherent dangers of the bathroom if he ". . . *suddenly became self-injurious* . . .". T5064. Even assuming, *arguendo*, that a staff member was standing outside the bathroom with the door open, it was reasonably foreseeable that Student A could *suddenly* injure himself in the bathroom, accidentally or intentionally, before Respondent or another staff member would be able to react and intercede to prevent injury. This is another example of Respondent's poor judgment with respect to Charge 1.

Student A banged/slammed the toilet seat up and down on at least one occasion while in time out in the classroom bathroom. This contradicts Respondent's testimony that Student A was "*not self-injurious*", and "was *just sitting on the [bathroom] floor*".

T5064. Respondent's testimony that Student A banged/slammed the toilet seat because he wanted to be alone in the bathroom is not credible. T4851-4852, 5061-5062. Schneider acknowledged that Student A banging/slamming the toilet seat was dangerous. T4509. Respondent's response to Student A banging/slamming the toilet seat was to tape the toilet seat down – not to remove Student A from the bathroom or discontinue use of the bathroom for time outs. T5061-5062. This further demonstrates poor judgment with respect to Charge 1. Schneider's testimony that the "*danger was alleviated*" by taping down the toilet seat was not credible. T4509.

Respondent testified that because "*[Student A] wasn't banging his head into the toilet seat. He wasn't banging his head into the sink like . . . [Student E] would have done*.", she did not consider Student A banging/slamming the toilet seat to be behavior that could lead to injury. T5062. This testimony is not credible, and the comparison to Student E is not persuasive. It is important to note that when Student E engaged in what Respondent considered self-injurious behavior in the classroom bathroom the previous school year (Respondent Exhibit 57, T3435-3436) – when Student E was *voluntarily* in the bathroom during an erection, and Respondent had Russo's permission and authority and parental permission to allow Student E to be alone in the bathroom during an erection – Respondent testified that she immediately and permanently discontinued use of the bathroom for Student E's erections. T4698. Clearly, during the 2013/2014 school year, Respondent realized that the classroom bathroom was an inappropriate and unsafe place for a student exhibiting tantrum-like behavior.

Yet, incredibly, Respondent testified that the very same bathroom toilet, sink,

bars, mirror, tiled floor and tiled walls were a dangerous setting for Student E during the 2013/2014 school year, but not for Student A during the 2014/2015 school year. T5060-5064, at 5062. This further demonstrates Respondent's poor judgment regarding her Charge 1 conduct.

Actual Impact on Student A's Health, Safety And Welfare

Student A's mother voiced concern to Berger that:

> *[P]rior to going to Ms. Weitzman's classroom [Student A]'s toileting skills were appropriate. He stood up to go to the bathroom.* ***After he started in that class*** *he sat down to go to the bathroom.* ***He also would walk himself to the bathroom if he thought he did something wrong at home.*** *That was in relation to the timeouts in the bathroom. She just was very unhappy with the regression he showed. There were many things he couldn't do that he had done previously when he was in West School [the previous school year, i.e. the 2013/2014 school year].*

T2014-2015. [**Emphasis** added].

Occupational Therapist Maria Arroyave ("Arroyave") informed Berger that Student A was regressing:

> *Student A is now doing things different in the bathroom. Now he's sitting instead of standing. He's playing with his feces. He never did that previously.* ***He put himself in the bathroom and he closed the door and he wouldn't come out. These are things he had never done before and she [OT Arroyave] noticed it starting the end of October and in the beginning of November.***

T2025-2026. [**Emphasis** added].

Berger's testimony, quoted above, is corroborated by Student A's mother's testimony. Student A's mother testified credibly that she did not speak with

Respondent in person or by phone anytime from September through November 2014. She responded to Respondent's entries in the communication notebook based upon the information in Respondent's entries. According to Respondent's entries, Student A was adapting well to his new school and everything was going well. She was never informed by Respondent of tantrumming behavior changes; of problems with any other students; or that the bathroom was being used for time outs.

Respondent never showed Student A's mother the social story, or informed her of the existence of the social story – even though it twice negatively invokes "Papa" in relation to Student A's behavior: "*When [Student A] does NOT listen to his teachers, everyone is sad ☹ When [Student A] cries and lays on the floor,* ***[Student A] cannot have Papa*** *or the smartboard.*" And, "When *[Student A] cries and lays on the floor, he has to go sit in the bathroom alone until he stops crying.* ***Papa is sad when [Student A] has to sit in the bathroom*** *☹*". District Exhibit 18, pages 7 and 8 [**Emphasis** added]. Respondent writing this in the social story without any notice to, discussion with, or consent, permission or authorization from either of the student's parents was poor judgment.[32]

Student A's mother only found out about the existence of the social story, and that her son was being placed in the bathroom for time outs, at her meeting with Cantore, Natali and Russo on November 24, after Respondent's removal. Student A's mother testified she was "*very surprised because all of the notes [in District Exhibit 17]*

[32] The Hearing Officer notes that this is not the subject of an independent or specific charge, and it therefore has not been considered as such.

indicated that he was always doing well." T2248, 1725. Her testimony is corroborated by Respondent's communication notebook entries, discussed above. Indeed, Respondent's last entry, dated November 17, concluded with: "*[Student A] is doing great and I absolutely adore him!*". The record demonstrates that Student A was **not** "*doing great*". In view of Respondent's misleading and deceptive communication notebook entries, her attempt to shift blame to Student A's parents is misplaced and unprofessional. T5007-5008; Respondent Brief 18-19.

Incredibly, when asked on cross-examination if she would communicate to the parents of Student A that their child was going into the bathroom, are they aware of it?, Respondent testified, emphatically:

> *I never would do something like that. I did what I always did. I monitored the student. I experimented with different interventions. When I found one that worked I set up a meeting with the parents. I discussed everything that I had done, all of the interventions I had experimented with, which one was the most successful, and discussed making that more of a formalized BIP. But like I said, I rarely wrote them, only if it was actually requested.*

T5012.

The record does not support Respondent's assertion that Student A's alleged self-selection of the bathroom began at home, and carried over to school. Rather, the record indicates that it began at school, at Respondent's direction, as a negative consequence of his classroom behavior.

Notably, Ryan testified credibly that she saw Student A alone in the bathroom for non-toileting issues twice in *October* 2014 (T2126-2127; 2135-2136); that Student A started to have "meltdowns" in *October;* and Respondent told her that the bathroom

was being used as a time out spot for him. T2126-2127. This corroborates Ragona's testimony and Student A's mother's testimony, as well as Berger's testimony about what Arroyave told her (Berger).

The Code of Conduct requires that "*Teachers . . . 8. Address . . . any situation that threatens the emotional or physical health or safety of any student, . . .*". Respondent Exhibit 54, p. 6. The record establishes that Respondent's proven culpable Charge 1 conduct *created* such a situation.

Thus, the District presented credible and persuasive evidence in support of Charge 1 that Respondent's conduct endangered the health, safety and welfare of Student A.

Based upon all of the foregoing, and in view of the full record, the District established each of the elements of Charge 1.

OTHER DEFENSES SPECIFIC TO CHARGE 1

Respondent's Code of Conduct Defense

Respondent argues that use of the bathroom for Student A did not violate the District's Code of Conduct or Section 200.22 of the Regulations of the Commissioner of State Education, 8 CRR-NY 200.22. Respondent cites Russo's testimony and argues ". . . *Student A was never alone [in the bathroom]. Therefore, using Russo's own definition, the bathroom was not a time out room.*" Respondent Brief 27-28. However, the record establishes Student A was *not* "never alone" in the bathroom. Consequently, this argument is not persuasive.

Respondent cites Cantore's testimony and argues, "*According to Cantore, if time*

out is done in any room other than the classroom, it is a time out room unless the other room is also a classroom. . . . Since Student A's time out was in the class bathroom which is used for instructional purposes, under Cantore's definition it also was not a time out room." Brief 28. This argument is not persuasive. While it is true that the classroom bathroom was used to teach Respondent's students their hygiene ADLs, the record establishes that the classroom bathroom was a separate and distinct room within the classroom. The bathroom had its own door and floor-to-ceiling walls, none of which were equipped with windows. There were no observation devices, and Student A was in the bathroom while tantrumming while not under visual observation. A student alone in such a room is not in the "classroom", unlike a student who is in a different area of the classroom and under visual observation, not surrounded by windowless bathroom walls and door.

Respondent testified regarding the bathroom that, "*It was an instructional part of my classroom. I just considered it another part of my classroom.*" T5029. However, when a student is placed alone in such a room as a consequence of tantrumming behavior, without visual observation, reliance on the Code of Conduct's allowance of time out in a "classroom" is not persuasive. Respondent Exhibit 54, p. 24. Respondent's assertion that the Code of Conduct's use of the term "classroom" is ambiguous in this situation is not persuasive.

Respondent's Custom and History of Time Out in the District Defense

Respondent argues that even if the bathroom was not part of her classroom, she acted in accordance with what she alleges to be the extensive custom and history of

using time out in the District.

> *For example, teachers and administrators permitted students to deescalate in an office, a bathroom, a hallway, a classroom, and even inside a small locker. District Administrators knew about and condoned this practice for years. Accordingly, Respondent reasonably relied on well established customary practice in permitting Student A to deescalate in the bathroom, and she must not be penalized for that reliance*.

Respondent Brief 33.

Respondent cites specific examples from the record. Respondent Brief 32-43. However, they are each distinguishable from the case at bar, and not persuasive. Unlike Respondent's proven conduct, none of the other instances in the record involved placing a student alone in a room. None involved placing a student in a bathroom. None involved holding the door closed to confine the student alone in the room against the student's attempts to open the door.

During elementary school in the District, special education Student G[33] was brought to the elementary school gym for time out, without other students present, *but his aide was always with him*. T2805. Likewise, there is no evidence that Student G was alone in the elementary school autism room, or alone in the elementary school classroom side-room. Being with staff in these places for time out is readily distinguishable from being alone in a classroom bathroom for time out.

When Student G was Teacher Christina Dillard's student in LBMS, Respondent was instrumental in developing a "separate location" intervention strategy, pursuant to which Student G was moved to a separate location for instruction. The separate

---

[33] Respondent was not Student G's teacher in elementary school, nor in LBMS.

location was Ramsey's speech office in Dillard's classroom. This very successful strategy involved Student G folding clothes in the speech office. The strategy is contained in Student G's FBA. Respondent Exhibit 40. The FBA does not call for Student G to be alone in the speech office. There is no evidence that Student G was alone in the speech office. Being with staff in the speech office is readily distinguishable from being alone in a classroom bathroom for time out.

Similarly, when Student B was brought to a LBMS administrative office, Respondent testified that she (Respondent) or a TA was *in the room with him*. T4555. There is no evidence that Student B was alone. Nor was Student B alone when dividers were used in Respondent's classroom and in the hallway.

Respondent argues that these non-Student-A time out measures were implemented prior to or without an FBA/BIP, CSE meeting, inclusion on the IEP, or parental involvement. Be that as it may, a student being with a teacher or a TA in an administrative office, or in any of the other rooms/places cited by Respondent, is readily distinguishable from a student being alone in a bathroom for time out.

The same is true with regard to Respondent's reference to Student F having time outs in the LBMS courtyard, auxiliary gym, auditorium and in the hallway with dividers. There is no evidence that Student F was alone in these locations, or was placed in a bathroom for time outs.

Respondent argues that dividers were used with Student C for time outs, and

that Student C was brought to the LBMS nurse's suite,[34] wrestling room or tennis courts for time out or holding while awaiting parental pick-up. Again, there is no evidence that Student C was alone in these instances, or that she was placed alone in a bathroom for time outs.

Respondent argues that other separate LBMS rooms/places were used as time out areas, in addition to the above. Specifically, the guidance conference room and extra guidance office, the shared deans' office, and on occasion Respondent's classroom. Respondent's Brief states Schlegel *"would have them sit alone before she came in. (Schlegel 3391)."* Respondent Brief 42. This mischaracterizes Schlegel's testimony. Schlegel did *not* testify that students sat *alone*. Rather, she testified that students sat in the "*guidance suite where we have three guidance counselors and myself are there, so, one of the guidance counselors or myself, . . . we might just ask them to . . . sit for a minute or two before we either joined them or bring them to our office to continue the intervention.*" T3391. Schlegel was describing a *suite* of rooms, occupied by four (4) staff members, with the students in "*either the conference room or the extra office there, . . .*". T3391. There was no testimony that the doors to either room were closed when occupied by a student, or that students were alone, or not under visual observation by staff. Thus, Respondent's statement that students sat *"alone"* is speculation not supported by this testimony, or the record as a whole. What Schlegel described is not comparable to

[34] A student [unrelated to this charge] with body odor issues showered in the bathroom shower of the school nurse's suite. There is no record evidence, nor suggestion, that the student was *placed* in or *required* to go into the shower/bathroom, whether as a behavioral consequence or not. T3390.

Respondent's use of the bathroom for Student A.

Respondent's comparison to Student A's one-time locker incident (T4861, Respondent Brief 49-50) is readily distinguishable. It is undisputed that on one (1) occasion after Respondent's removal, Student A placed himself into an empty locker in a wall unit in the classroom while tantrumming. However, in contrast to Respondent's placement of Student A in the bathroom: Student A was not placed in the locker by staff; he was free to exit the locker at any time without the locker door being held closed against him; while inside the locker, he freely opened and closed the locker door several times without it being held closed against him; he was technically "alone" in the locker, but it was physically impossible for any staff member to fit in the locker with him; staff stayed next to the locker for the duration of the incident, monitoring him and asking him a number of times if he wanted to come out. T3403-3406, 3465-3466.

During this one-time locker incident, the staff had visual observation of Student A. The locker was otherwise empty, with "*nothing for him to touch or grab . . . nothing in there for him to smash or break or hurt himself on.*" (T3653-3654), unlike the bathroom with its water-filled toilet, sink, exposed plumbing, metal garbage receptacle with jutting corners, *inter alia*, described above. And, the locker and wall unit it was part of were in the classroom, not in the walled-off and doored-off separate and distinct physical space of the bathroom.

Use of the bathroom for Student E the previous school year (2013/2014) is readily distinguishable. As discussed above, Student E had penile erection issues during

school. ***After conferring with Student E's family and Russo***, Respondent was ***permitted to let*** Student E to go into the bathroom, alone, when he was experiencing erection issues. T1013-1017, 4698-4699, 4717.

Russo testified credibly that time out in a bathroom is aversive (T936), and Respondent was not permitted to use an aversive time out. T843. However, Respondent testified steadfastly that she does not find such use of the bathroom to be aversive. T5243. Indeed, Respondent testified she would *continue* such use of the bathroom: "*He [Student A] made the assessment. I agreed with it.*" T5009. "*I have to respect their forms of communication, and unless he's going to do something dangerous like crawl into a locker and close the door, I will allow him.*" T5010. Respondent further testified: "*I tried to support the idea that he was being independent and utilizing a tool that most of my students after three years of my working with them on could not accomplish.*" T5011-5012. Thus, the record establishes that Respondent continues to fail to see the inappropriateness and danger of her poor judgment regarding her proven Charge 1 conduct.

Respondent's argument that her classroom did not receive help to handle violence is against the weight of the credible evidence with respect to Charge 1. T3661. Russo's November 21 email (Respondent Exhibit 63), regarding staff response to Student A's tantrums after Respondent's removal from the classroom days earlier, is not persuasive evidence in support of Respondent's argument. T3656-3665.

Student A alone inside a cardboard playhouse situated in the classroom is readily distinguishable from Student A alone in the classroom bathroom, Respondent's and Schneider's testimony notwithstanding. T4848-4849; T4491-4492. Notably, unlike

the bathroom, the cardboard playhouse had "*little windows and doors*". T3652.

Respondent's assertion regarding the distinction between "time out" and "time out from reinforcement" is not a persuasive defense to this charge. Respondent's assertion of a lack of distinction between "time out room" and "separate location" is not a persuasive defense to this charge. T1165-1167, 3416-3419, Respondent Exhibit 10.

Respondent's argument that timers were used to measure the length of time Student A was in the bathroom is not persuasive.

That Respondent complied with Russo's direction to stop using the bathroom for Student A is not a persuasive defense to the charged conduct that preceded Russo's direction.

That Respondent collected data did not operate to authorize or justify her use of the bathroom for Student A in the unauthorized and inappropriate manner that she did. Nor does the record reflect that data was collected every time Student A was placed in the bathroom. As discussed above, the record shows that Student A was placed in the bathroom in October, not just November, and that Respondent's recorded data does not reflect all the occasions on which Student A was placed in the bathroom in October and November.

A recurring defense is that 1:1 TAs did not stay with their respective 1:1 students. This is not a persuasive defense to Respondent's proven culpable conduct. This is particularly so in light of Respondent's testimony that:

I rotated my staff, so even if somebody had a one-to-one that was for them I

tried to have different staff work with the kids throughout the week so that the child didn't start favoring one specific adult and only respond to that specific adult. I think it's to try to teach generalization of responses.

T4597.

Respondent did not introduce any evidence that such a practice was authorized or customary in the District. Thus, Respondent's practice of rotating 1:1 TAs does not serve as a shield in her defense.

The record establishes that Respondent commanded the staff in her room, including Respondent commanding her staff to implement her "isolation strategy" of placing and confining Student A in the bathroom alone.

The Hearing Officer has carefully considered each of Respondent's defenses to Charge 1, and finds the remainder of them unpersuasive and insufficient against the weight of the credible evidence establishing the charged conduct.

CONCLUSION - CHARGE 1

Respondent's culpable Charge 1 conduct constitutes misconduct, neglect of duty, and conduct unbecoming a teacher. It violated the District's Code of Conduct, of which Respondent was on notice. Therefore, it is not necessary to address the parties' disputes over the applicability/violation of Section 200.22 of the Regulations of the Commissioner of State Education, 8 CRR-NY 200.22; nor whether Respondent usurped the statutory role and authority of the CSE.

[redacted]

[redacted]

CHARGE 3

In or about March 2014, Respondent endangered the health, safety and/or welfare of Student B, a disabled student classified by the CSE as multiply disabled, in that Respondent physically grabbed Student B, pushed and held him flat up against a wall by his shoulders to restrain him, or action to that effect, in response to Student B's behavior.

The District met its burden of proof on this charge. Respondent is guilty of Charge 3. Under the facts and circumstances of this record, Respondent's culpable conduct on this charge constitutes misconduct, neglect of duty, and conduct unbecoming a teacher.

The District's Code of Conduct allows the use of "*reasonable physical force*", "*in situations where alternative procedures and methods that do not involve the use of physical force cannot reasonably be used*". One such specified situation is: "*C. Restrain or remove a student whose behavior interferes with the orderly exercise and performance of school district functions, . . . In all cases, the employee is expected to use the minimum amount of force necessary.*" Respondent Exhibit 54, p. 38 [Emphasis added].

It is undisputed that Respondent had notice of the Code of Conduct. It is also undisputed that the pulling of a fire alarm in a school building when there is no fire or other emergency is behavior which "interferes with the orderly exercise and

performance of school district functions".

It is undisputed that Student B had a proclivity to pull fire alarms in the school building when there was no fire or other emergency. Indeed, on one prior occasion he caused a "chaotic" situation by doing so at afternoon dismissal time. That incident completely disrupted dismissal, school-wide. No one could leave the school grounds and students could not board school buses until after the fire department arrived to inspect the school building, and an "all clear and all accounted for" could be given to resume dismissal. Without question, this very seriously interfered with the orderly exercise and performance of school district functions.

On the day to which this particular charge pertains, determined to be April 1, 2014, Respondent observed Student B lunge for the hallway fire alarm, about to pull it with his hand. It was "After-School" dismissal time. The record establishes that Respondent justifiably grabbed Student B with necessary and reasonable force to prevent him from pulling the fire alarm. Doing so was not culpable conduct. However, Respondent then unnecessarily forcibly pushed Student B eight (8) feet across the hall and into the opposite hallway wall. Respondent used unreasonable, unnecessary, and excessive physical force to do so. This was culpable conduct in violation of the Code.

Respondent's defenses to this charge can be summarized as follows: *Student B's propensity for pulling fire alarms was well known to all relevant staff; undisputedly, a student should not be allowed to pull a fire alarm when there is no fire; in such a case it is appropriate for an adult to move the student away from an alarm; this is precisely what Respondent did; Russo told Respondent to do whatever she could to stop Student B from*

pulling fire alarms; Respondent trained the staff to proactively walk Student B on the other side of a hallway when approaching a fire alarm, to walk between him and the alarm to be a physical barrier, and to be alert for his "tell", which was making a high-pitch "beep-beep" alarm-bell sound; D'Alessio and [TA Jaime] Arkow were aware of Student B's propensity to pull fire alarms, but despite their training by Respondent, they were chatting with each other approximately 30 feet behind the students, in the 90 feet long (and eight (8) feet wide) hallway, leaving TA Jana Cohen alone with the students up ahead; all of the students and TAs should have been walking together, and Student B's 1:1 TA should have been next to him; Respondent heard Student B's "tell" from behind and realized he was about to go for the fire alarm; Respondent ran as fast as she could, but Student B lunged for the alarm before Respondent could place herself between him and the alarm (as she had done on previous occasions), and before Respondent could put her hand over the alarm to block Student B's hand; Student B's hand was already on or touching the alarm, but it had not yet been pulled; Respondent pulled him by his backpack out of reach of the fire alarm, put him in a SCIP ["Strategies for Crisis Intervention and Prevention"] non-squeeze "bear hug" hold to prevent him from using his hands to reach for the alarm again; Respondent walked Student B backwards to the other side of the hallway, calmed him down, reminded him not to pull fire alarms, and let him go. He laughed, proceeded to exit the school and boarded the bus, completely uninjured and without evincing any sign of pain.

Respondent argues that D'Alessio's hearing-testimony version of events varied significantly from her investigation-interview version, particularly regarding whether TA Jana Cohen was pulling Student B's shirt, whether Respondent spun Student B, and

whether Respondent held Student B's shoulders flat against the wall, which Respondent asserts was an impossibility because Student B was wearing a backpack. Respondent argues that TA Jaime Arkow's hearing-testimony version varied significantly from either of D'Alessio's versions, particularly in that Arkow testified Respondent grabbed Student B with one hand, pushed his back (and therefore backpack) up against the wall without spinning him, and Respondent was only "a little forceful with the book bag". This, argues Respondent, stands in contrast to D'Alessio's testimony that Respondent "threw" Student B against the wall, and investigation statement that Respondent "pinned" him against the wall with Respondent's two hands on his shoulders. It also stands in contrast, Respondent argues, to Arkow's investigation statement that Respondent "grabbed Student B by his lapel and shoved him up against the wall, saying, 'No, stop.'". Respondent argues that at one point during the investigation Arkow believed it was Schneider, not Respondent, who stopped Student B from pulling the alarm, but despite this and the above contradictions, Berger did not interview Cohen.

Respondent's argument that Cohen was not interviewed as part of the investigation is not persuasive. As Respondent established during the hearing, this incident happened on Cohen's last day of employment with the District (Respondent Exhibits 110 and 111), which was more than seven (7) months before the events of Charge 1 triggered the District's investigation. Additionally, Cohen was not called as a witness. Counsel for both parties were well aware of their ability to independently issue process to obtain witnesses, and/or to submit same to the Hearing Officer. T2288-

2290. Of the many subpoenas *ad testificandum* submitted to the Hearing Officer for this proceeding, none were for Jana Cohen. There was no suggestion nor proffer that Jana Cohen was unavailable to be subpoenaed or to testify.

Respondent testified that she did not throw Student B up against the wall, his back did not touch the wall at all, and that it was actually *Respondent's* back that was on the wall, with Respondent holding Student B in front of her. T4599-4601, 4600, 4622, 4993, 5093-5097, 5265. When Schneider was asked if she saw Respondent "slam [Student B] into the wall in any way?", Schneider testified, "*Not that I saw*." T4302. Upon careful review of the entire record, the Hearing Officer credits the testimony of D'Alessio (T1293-1297, 1322-1332) and Arkow (T2098-2103, 2108-2119) that they each saw Respondent push Student B against the *opposite* hallway wall *with physical force*.

Both D'Alessio and Arkow provided credible testimony – and each separately provided a physical demonstration in the hearing room during their respective sequestered testimonies – that Respondent used physical force to *push Student B up against the opposite wall* from the fire alarm – a stipulated distance of *eight (8) feet*. Their credible testimonies and physical demonstrations constitute *compelling* evidence in support of this charge. Their respective testimony varied as to the *degree* of physical force Respondent used on Student B, but not as to the fact that *Respondent pushed Student B eight (8) feet across the hallway and up against the opposite wall.* Taking into account that Respondent is not a large person herself, the record nevertheless establishes that it was not at all necessary for Respondent to push Student B against the

opposite hallway wall, with *any* degree of physical force.

It is undisputed that "Student B was a very small boy". Respondent Brief 92. Asked on direct by Respondent's counsel if Student B was a particularly small child, School Nurse Thurston testified he was "smaller than average". T2473. Asked during cross-examination by Respondent's counsel if it was correct that Student B was a small student, small in stature, with small bone structure, Cantore testified, "I would say he was probably on the short side, yes. . . . he wasn't a large individual." T1740.

Respondent's argument that Russo told her "to do whatever she could" to stop Student B from pulling fire alarms is not a viable defense to this charge. The record provides no support that these words could reasonably be interpreted to authorize unreasonable, unnecessary, or excessive use of force to stop Student B from pulling fire alarms.

Taking into consideration all of the witness version variations of this event, and the inconsistencies pointed out by Respondent, the fact remains that whether Respondent used one hand or two, whether Respondent grabbed Student B by his shoulder(s), lapel(s), backpack or backpack shoulder strap(s), and/or whether or not she spun him, the record establishes that Respondent used unreasonable, unnecessary, and excessive force to unnecessarily push Student B eight (8) feet across the hall and forcefully against the opposite hallway wall. Respondent's doing so demonstrates that she temporarily lost her self-control.

Respondent argues that the disparity in the record between D'Alessio's post-incident telephone call to Arkow, vis-a-vis the date of Spring Recess, and the fact that

neither D'Alessio nor Arkow reported the incident, are affirmative proof that Respondent's version of this incident is correct. In view of the full record, this is not persuasive. Notably, Arkow testified credibly that during their telephone call about this incident, she agreed with D'Alessio's assessment of how Respondent handled Student B, and agreed with D'Alessio's desire to report the incident. T2101.

The parties dispute who was in charge of and/or responsible for walking Student B and the other students to the bus at the time of this incident. However, in any case, the fact remains that Respondent unjustifiably used unreasonable, unnecessary, and excessive physical force to unnecessarily push Student B eight (8) feet across the hallway and into the opposite hallway wall. Similarly, whether or not a 1:1 TA could have or should have prevented Student B from getting to the fire alarm does not excuse or justify Respondent's use of unreasonable, unnecessary, and excessive force *after* Respondent justifiably used reasonable and necessary physical force to prevent Student B from pulling the fire alarm. Student B was not using physical force against Respondent, or anyone else, when Respondent pushed him across the hall and into the wall.

Respondent correctly points out that there is no allegation that Student B was injured, or was caused any pain, during or as a result of this incident. However, neither injury nor pain is a necessary element for a finding of unreasonable, unnecessary, and excessive force.

Respondent correctly points out that the hallway involved was equipped with video cameras, but that the District was unable to find video of the incident.

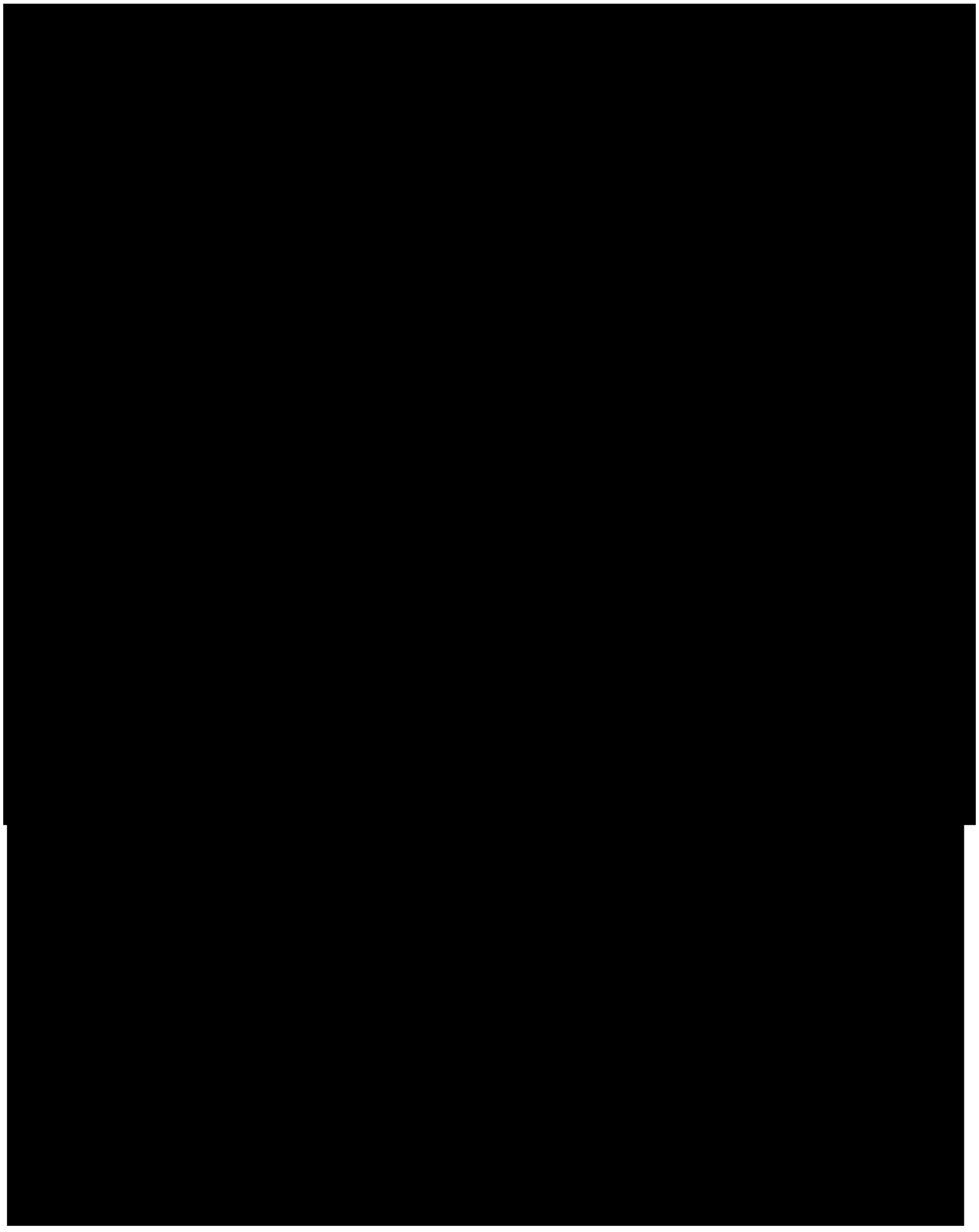
Respondent argues that her account of this incident is consistent with the District's inability to find such video, and that the lack of video evidence of this incident is because the incident is a "fabrication". However, the record establishes that the conduct alleged in Charge 3 did in fact occur. Indeed, Respondent testified extensively about who-did-what during this incident. The District did not obtain knowledge of this April 1, 2014 fire alarm incident until more than six (6) months later, in the next school year, during its investigation of the conduct alleged in Charge 1, which arose in mid-November, 2014. Berger and Arkow gave credible testimony of their good faith efforts searching for video of this incident, without success. T1922-1925, 1933; 2118-2119. The record does not support a finding that the District's inability to provide video from more than seven (7) months prior to its first knowledge of the incident was intentional, in bad faith, and/or intended to disadvantage Respondent's defense.

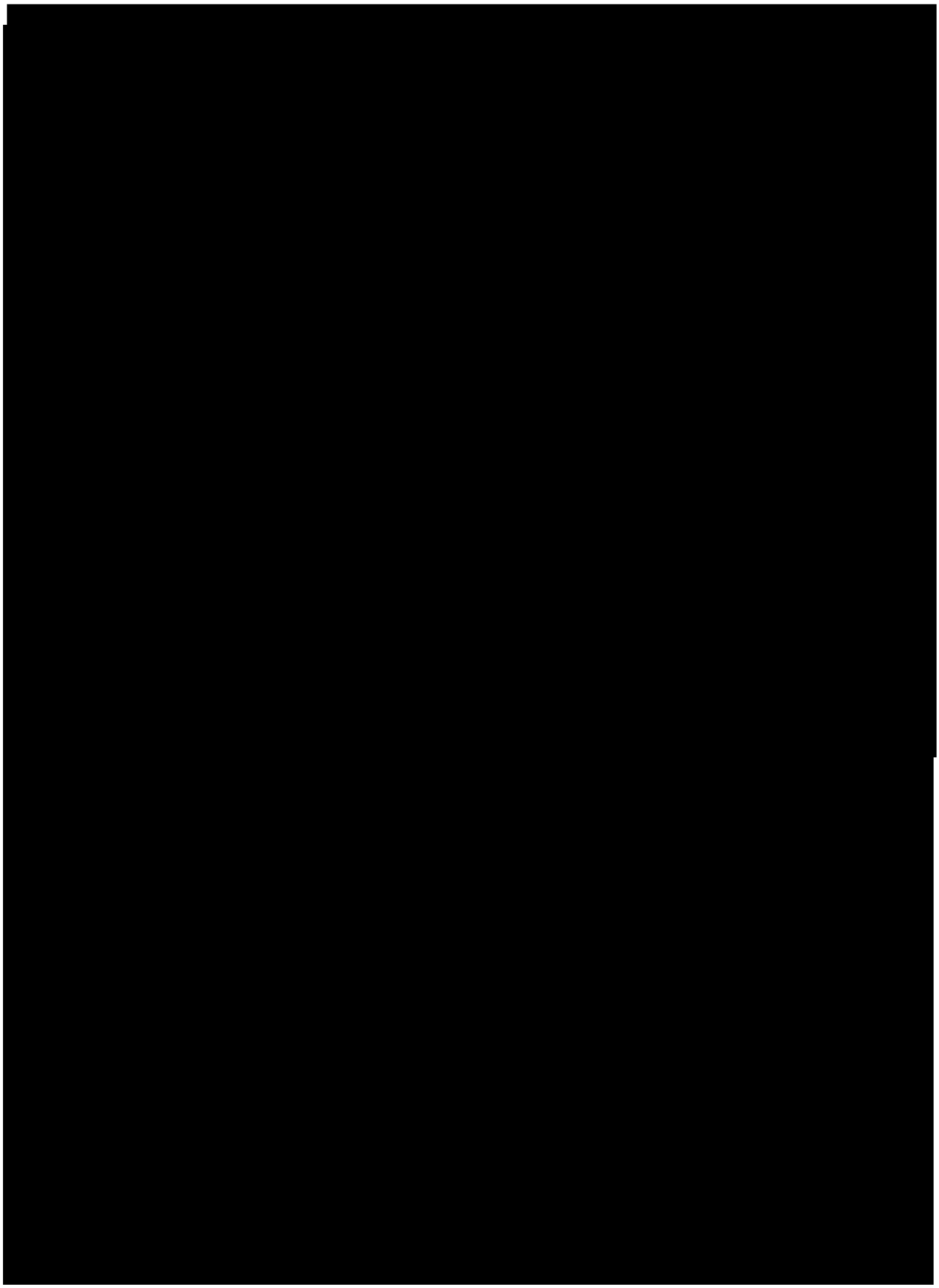
While video evidence might well have been probative, its unavailability did not prejudice Respondent in preparing an adequate defense to this charge. Moreover, the compelling testimonies and physical demonstrations by the District's two eyewitnesses establishing this charged conduct withstood rigorous cross-examination by Respondent's counsel.

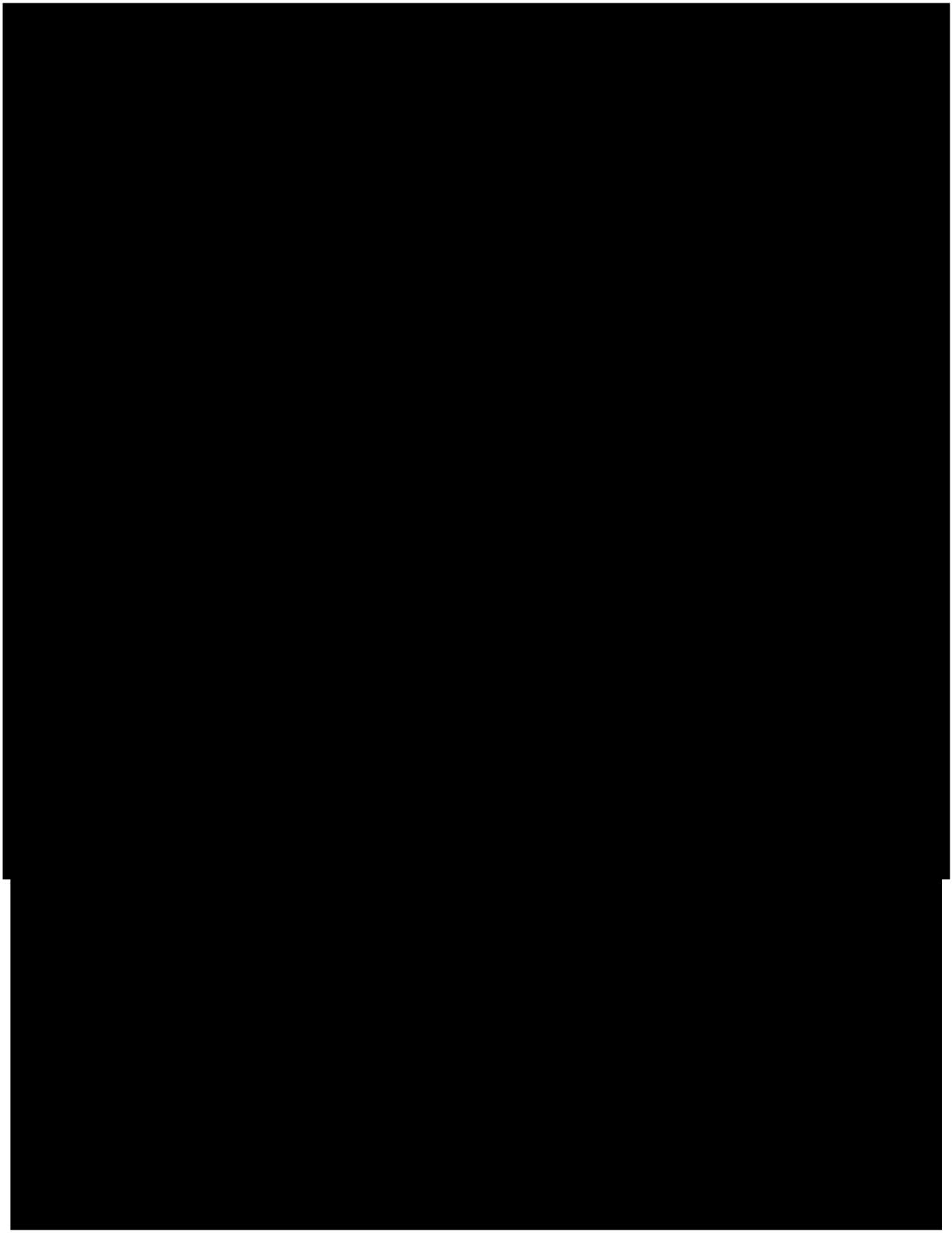
The Hearing Officer has carefully considered each of Respondent's defenses to Charge 3, and finds the remainder of them unpersuasive and insufficient against the weight of the credible evidence establishing the charged conduct.

[redacted]









[redacted]

CHARGE 8

During the 2013-2014 school year, Respondent endangered the health, safety and/or welfare of Student E, a disabled student classified by the CSE as having autism, in that on one (1) or more occasions, Respondent dispensed Motrin to Student E when she believed he needed it for headaches.

The District met its burden of proof on this charge. Respondent is guilty of Charge 8. Under the facts and circumstances of this record, Respondent's culpable conduct on this charge constitutes misconduct, neglect of duty, and conduct unbecoming a teacher.

It is undisputed that Respondent knew the District's strict policy prohibiting teachers, including herself, from providing, dispensing or administering any medication to any student at any time at any District facility. T2462-246, 2548, 5104-5105 [other than use of an EpiPen during field trips (T4996), which is not at issue in these charges]. The Code of Conduct requires that "*Teachers . . . 4. Know school policies and rules, . . .*". Respondent Exhibit 54, p. 6.

Respondent testified that she never gave medication to any student in school, including Student E, and adamantly denies the charge. T4720-4721, 4996, 5281.

Respondent's defenses to this charge can be summarized as follows: *TA Kristin Pipitone's ("Pipitone") and TA Amy Teemer-Deale's ("Teemer") testimonies completely contradict each other (i.e., Pipitone testified: liquid Motrin; kept in metal cabinet by Respondent's desk; orange color; dispensed with dropper or cup. But, Teemer testified: liquid Tylenol or Midol; kept in Respondent's desk drawer; reddish or pink color; dispensed with a*

straw-like device); Student E took Advil for tantrums, not for headaches; Student E took Advil while in LBMS, not Tylenol, Midol or Motrin; the Advil he took in LBMS was grape flavor, purple in color, not orange, reddish or pink; in LBHS he took cherry flavor Motrin, and "curiously", Pipitone and Teemer were with Student E in LBHS; notably, Ramsey, Schneider and Russo never saw Respondent dispense Motrin, and Russo never received a complaint about it; Respondent knew that teachers have no authority to dispense medications; Respondent would call Student E's mother if he needed medication during school; he would be brought to the school nurse's office where his mother would administer the medication, and later on, the school nurse would administer it to Student E pursuant to a doctor's prescription; Student E's mother testified she never gave Respondent Advil for him, and would never ask Respondent to give Advil to him; Schneider testified there were no liquid medications in the classroom; only food and paper goods were kept in the metal filing cabinets, and Respondent's desk drawer did not contain any liquid medicine; the District's testimony is contradictory; the only credible evidence came from Respondent; and Respondent provided medical records, text messages and direct testimony directly contradicting the District's "wild story".

Upon careful review of the entire record, the Hearing Officer credits the testimony of TAs Pipitone (T1364-1365, 1395-1399, 1406-1407, 1417-1418) and Teemer (T2047-2048, 2079-2085, 2086-2087) that they each saw Respondent dispense a liquid substance for headaches into Student E's mouth on a number of occasions (Pipitone: four (4) times (T1398); Teemer: more than five (5) times (T2080)) during the charged period, and that Respondent stated she had Student E's mother's

permission to do so (Pipitone T1364, 1396; Teemer T2081, 2086). Their credible and persuasive testimony is corroborated by the record.

Student E's mother testified "*of course*" he needed Advil while he was at school. T2682. She testified he took Advil for "*headache, for sinus pressure*." T2682. If he "*had a rough night with sinuses, so we* [Student E's parents] *let him sleep longer*" and would then bring him to school. T2754. This contradicts Respondent's assertion that Student E took Advil only for tantrums, not for headaches.

Student E's mother testified, ". . . *we started giving him Advil as a liquid because he doesn't take pills. He cannot chew it. We tried to do the pills, but it didn't work, so we always have success with Advil liquid.*" T2682 [Emphasis added]. Student E's mother testified that during Middle School Student E was not on any prescription medication, but did take over-the-counter medicine such as, but not necessarily, Advil, Motrin, and the like. T2736-2738; 2764.

During the charged school year, on March 31, 2014, Student E's parents had him evaluated by Pediatric Neurologist Joseph Maytal, who issued a report to Naomi Watman, MD. Respondent Exhibit 37. The pediatric neurologist's report states Student E's parents informed him "*that over the last few months [Student E] has been having temper tantrums that last up to 15 minutes each. During the typical episode he may cry and close his eyes and put his hands on his forehead.*" It is apparent from the record that these symptoms and behaviors are reasonably consistent with the appearance of headaches to non-medical-professionals. Indeed, Pipitone testified that Student E would have headaches, and pound or slap the temple area of his head (T1364); Respondent

would say he was having a headache and then Respondent would give him liquid medicine. T1395-1397. Teemer testified Student E would bang his head with his hands, to which Respondent would respond "Maybe he has a headache", and then Respondent would administer liquid medication to him. T2083-2084. As noted above, Student E's mother testified he suffered from sinus headaches, and took Advil, in liquid form, for his sinus headaches. T2682. Again, this contradicts Respondent's assertion that the medication was only for tantrums, not headaches.

Additionally, the record demonstrates a unique relationship between Respondent, Student E and Student E's parents outside of school, described below. This unique relationship constitutes substantial evidence tending to corroborate the credible testimony in support of the charge. It is undisputed that Student E's parents entrusted Respondent to live in their home alone with Student E and his younger sister, around the clock, for five (5) consecutive days and nights, taking sole care of both children while the parents went on a business trip to Las Vegas. T2759-2761. Also, Respondent babysat Student E and his younger sister from morning until evening, each day for a summer week when they were off from summer camp. T2759-2760. And, on one other occasion, when Student E's younger sister suffered a seizure while Student E's father was away, it was to Respondent that Student E's mother turned for Student E's care during the crisis. T2759-2761.

The record does not establish that Respondent's unique extracurricular relationship with Student E's family was a violation (nor is it a charge). The Hearing Officer makes no judgment about the propriety of the relationship. However, in view

of the full record, it does reasonably give rise to the inference that Respondent administered medication to Student E during the course of the five (5) consecutive days and nights that she lived with, and took care of, Student E and his younger sister around the clock as the only adult in the household.

Student E's mother's testimony in this regard was inconsistent, at best. She testified that she trusted Respondent enough to leave her children with Respondent while she (Student E's mother) and father went on the five (5) day business trip to Las Vegas. This happened because plans for Student E's mother's sister to come from overseas to mind the children fell through. T2633. Student E's mother testified persuasively that "*[Respondent] took care of my kids for five days and I was the happiest mom ever because I was not even worried for one minute*." T2634.

The record establishes that Student E frequently had headaches. When asked if she entrusted Respondent to give him medicine if needed during those five (5) consecutive days and nights, Student E's mother testified quite *un*persuasively: "*She--I don't remember if Lisa ever--because I would never allow my kids to have anybody giving them medication. This is how I am. And I do not--there's no way that I would let anybody--I was the one giving my kids…*". T2761. Student E's mother's testimony in this regard supports the aforesaid inference.

Respondent's testimony that she never gave Student E medicine at any time – *"Not even when I baby sat him*." (T4721), is not credible. Moreover, Respondent testified: *"I wouldn't have--I don't think I would have even known what [medication] she [Student E's mother] gave him. I know now from her testimony, but I don't think I even*

knew prior." This testimony is highly incredible, bordering on preposterous, particularly in light of Respondent having acted *in loco parentis* of Student E (and his sister) for five (5) consecutive days and nights while the parents were on the Las Vegas business trip, and Respondent having acted *in loco parentis* of Student E and his sister for five (5) consecutive summer days (without overnights) while they were not in summer camp.

Respondent's unique extracurricular relationship with Student E's family is consistent with the credible testimony of Pipitone (T1364, 1396) and Teemer (T2081, 2086) that Respondent stated she had permission from Student E's mother to administer medication to Student E at school.

Respondent's text message exchange with Student E's mother regarding the mother coming to school to give Student E Advil (Respondent Exhibit 92; T4724-4732) is not persuasive evidence in defense of this charge. The content of the text messages explicitly reference that they took place during the period Student E was in the midst of a painful toenail infection in December 2013, through January 2014, which concluded with surgical removal of the toenail in January 2014. Respondent Exhibit 57. That Student E's mother came to school to give him liquid Advil during this painful toenail episode is not mutually exclusive with the credible and persuasive testimony establishing that Respondent committed the charged conduct at other times during the charged school year, for Student E's headaches.

It bears mention that Respondent wrote in this text message exchange: "*I ADORE ur family and feel so lucky to get to be a part of it! Xoxo mwuah!*". Respondent's

text was in reply to Student E's mother's text, which stated: "*I thank you for the wonderful gifts. You are sloop* [sic] *sweet!!! Just want you to know that u r very special to us and we adore you great deal muahhhh.*" Respondent Exhibit 92 (December 19, 2013). The Hearing Officer makes no judgment about the propriety of the content of this text message exchange. However, in view of the full record, including the above-discussed unique relationship between Respondent, Student E and Student E's parents, this text message exchange further corroborates the credible testimony in support of this charge, discussed above.

That neither Pipitone nor Teemer contemporaneously reported Respondent's charged conduct does not diminish the credibility of their respective testimonies. That Ramsey and Russo did not see Respondent engage in the charged conduct, and Russo's credible testimony that he had seen Respondent bring students to the school nurse for medications (T1096), do not negate the credible and persuasive evidence satisfying the District's burden to prove that Respondent did engage in the charged conduct.

Respondent testified she did not have any student medication in her classroom. T4726-4727. She argues that the inventory of her desk drawer upon being relieved of teaching duties in November of 2014 shows no liquid medication was found. Respondent Exhibit 112. This is not persuasive, however, in part because Student E was in Respondent's class in the 2012/2013 and 2013/2014 school years. Student E was not one of Respondent's students in the 2014/2015 school year, which is when her desk was inventoried. Schneider's testimony that there was no medication in the classroom is not credible. T4424-4428.

Whether Respondent dispensed to Student E Motrin, Advil and/or Tylenol is immaterial to the substance of the charge, as the underlying conduct was the same. Respondent knew she had no authority to dispense any such substance to Student E in school. The charge provided Respondent with sufficient information to prepare an adequate defense, without prejudice. Upon full consideration of the record, including the medical records provided by Respondent, the variations in the record regarding name, brand, flavor and/or color of the medication do not materially detract from the credible and persuasive evidence that Respondent engaged in the charged conduct.

The Hearing Officer has carefully considered each of Respondent's defenses to Charge 8, and finds the remainder of them unpersuasive and insufficient against the weight of the credible evidence establishing the charged conduct.

Respondent's Defenses to the Charges, In General

Respondent's defenses, in general, can be summarized as follows: *the District did not meet its burden of proof; the charges are not supported by sufficient evidence; the charges are nothing more than retaliation against Respondent; the District's "investigation" was incompetent and one-sided; the District's witnesses were biased and unreliable, particularly Teemer, Lopez, D'Alessio, Pipitone, Ragona and Ceileski. These proceedings were brought because Respondent fought for the rights of her students: Respondent complained that the Teaching Assistants for the ASD/Bridge Program were not properly trained; Respondent complained that her students did not receive the required number of TAs; Respondent complained that no qualified substitute was provided when she was out; Respondent complained that Specials/Services were not provided to her students; Respondent*

"dared to call Cantore to task" for not doing her job; Cantore wanted to shutdown the ASD/Bridge Program; Respondent did not want her students treated differently; and Respondent had multiple concerns about the pool program. The District did not make out any case under 3020-a, and should be required to pay the cost of Respondent's defense.

Respondent's counsel argued: "*We never said there was a conspiracy. To the contrary, Ms. Weitzman has been clear from the very beginning that this was Sabrina Cantore's doing. She put it in motion, and the June 2014 meeting was just the beginning of the end.*" (T5368). Additionally, Respondent's counsel argued: "*It's all about keeping the three of them [Russo, Cantore and Natali] clean*". T5398-5399.

However, when asked on cross-examination if it is "*your testimony that she [Cantore] is the mastermind behind this **conspiracy** that led to these charges. That's your position[?]*", Respondent answered with an unequivocal "*Yes.*". T5191 [**Emphasis** added]. Indeed, Respondent further testified on cross-examination her belief that in relation to these charges stemming from her raising concerns at the June 2014 meeting, and the timing of these charges:

> A. *[Interposing] Well I think that would have been a little suspicious, right. So they waited.*
>
> Q. *They waited for this whole thing to play out through Laura [Ragona] raising the issue about the bathroom, correct? And they placed Laura [Ragona] there to start the whole*
>
> A. *[Interposing] I actually believe all of this, yes, yes.*

T5247.

Under the facts and circumstances of this record, the above are not persuasive

defenses to Respondent's proven culpable conduct. They are contrary to the weight of the credible evidence. For example, Respondent's claims and aspersions about Cantore are undercut by Respondent's laudatory email to her regarding Cantore's dealing with the conflict between Respondent and TA Teemer (Respondent Exhibit 64) – even taking into consideration that the email was sent three months prior to the June 2014 meeting with Cantore that Respondent complains of. Respondent sent the following email to Cantore on March 6, 2014, *verbatim*:

> *Hi Sabrina-*
>
> *I stopped by Lindell earlier to say, "THANK YOU" in person, but Charlene said I had just missed you :-(*
>
> *I would have really preferred thank you in person (instead of via an inpersonal email), but I guess this will have to do until I see you next!*
>
> *I cannot thank you enough for all of your help with the situation in my classroom.*
>
> *You were the only administrator that not only fully supported me, but that also stepped in and actually did something about the horrible situation that was just being made worse by the multiple mediations.*
>
> *I am happy to report that my classroom was nice and relaxed today. The two new staff members that replaced Amy [Teemer] did an incredible job and, not too surprisingly, the students' behaviors were significantly decreased today.*
>
> *I really cannot say enough how much I appreciate all of your help and support - I will never forget how you helped me and stood by me - I am forever in your debt!*
>
> *So, until I can say it in person, I'm sending you a BIG THANK YOU and a BIG HUG via email!!!!*

Lisa :-)

District Exhibit 33.

Respondent's explanation that she sent this email because of gratitude for what she considered to be the nice surprise of Cantore's unexpected help is not persuasive. T5304-5305; Respondent Brief 108.

In reaching this conclusion the Hearing Officer also considered that the record shows that Respondent and Cantore did not have "*much of a relationship*", in Russo's words. T949. Respondent was not the only special education teacher who expressed concern to Russo regarding Cantore not answering phone calls or emails, or visiting classrooms, and Cantore's general "lack of visibility". T995-998. However, the record establishes that this provided no excuse or justification for Respondent's proven culpable conduct. Additionally, Berger testified that it was not Cantore's responsibility to meet *personally* with special education teachers; rather, Cantore could meet with them through her special education coordinators. T1855-1860.

Respondent testified that District witnesses lied against her during their testimony. For example: Russo (T5017, 5073); Natali (T5246); Ragona (T5036); D'Alessio (T5178). Respondent's counsel argued that Ragona and Ceileski lied (T5376), and were biased and unreliable, as were D'Alessio, Pipitone, Teemer and Lopez. Respondent argues Teemer had bias against Respondent because of the above conflict between Respondent and Teemer, arising from an incident where Respondent criticized Teemer at a team meeting for allowing a school custodian to assist with one of the Bridge students in the hallway. Respondent also points out that Student C is a close

relative of Teemer, and avers that Pipitone and Teemer are good friends, and that Pipitone – and Berger – testified with palpable disdain for Respondent.

However, the record does not reflect that these witnesses risked their jobs, careers, professional licenses and potential perjury charges to falsely implicate Respondent. Respondent's various allegations of motive for false allegations and false testimony against her have been fully considered. In light of the weight of the credible and probative evidence, and Hearing Officer credibility determinations, they are not persuasive. They include, but are not limited to, Respondent's assertions above, and Respondent's assertions of: alleged revenge or retaliation for, *inter alia*, making subordinates do their jobs; for Respondent stating to colleagues or administrators that they and/or the District were not doing their jobs, or were not treating Respondent's students fairly/equally, or were not in compliance regarding Respondent's students; or that witnesses had personal or professional animus against Respondent.

Emphasizing that District employee witnesses were mandated reporters, Respondent argues that the conduct alleged against her in [redacted] did not happen, because it was not reported until the investigation of what became Charge 1. However, under the facts and circumstances of this record, the lack of contemporaneous mandated reporting can reasonably be interpreted as evidence that there was no conspiracy against Respondent, and that these individuals were not "out to get" Respondent. If they were "out to get" Respondent, they likely would have taken the opportunity to contemporaneously report such conduct – rather than not revealing it until up to three years later, and then only in the context of the District's

investigation. Failure to report an incident does not necessarily mean that the incident did not in fact occur. Nor does any employee's failure to report an incident excuse or justify Respondent's proven culpable conduct.

Conversely, the conduct alleged in Charge 1 *was contemporaneously reported*. On Thursday, November 6, the day Ragona learned of Respondent's use of the bathroom for Student A, she immediately inquired. Concerned by what she was told by Respondent and Schneider, later that same day Ragona initiated a group text message conversation about it with Respondent. The text message conversation ended on Friday, November 7, with an agreement to talk on Monday, November 10, to schedule a team meeting. Tuesday, November 11, was a holiday (Veteran's Day). The team meeting took place on Wednesday, November 12. Ragona discussed her concern with Respondent at the November 12 team meeting. Ragona's concern was not allayed. Respondent suggested Ragona discuss it with Russo (Respondent's supervisor), whom Respondent said "was aware of the situation". T1197.[35] Ragona and Ceileski did so, first thing the next morning on Thursday, November 13. The following morning, Friday, November 14, Ragona and Ceileski brought their concerns to *their* supervisor, Cantore. Ragona and Ceileski were supervised by Cantore, not Russo. Therefore, it was not improper or untoward for Ragona and Ceileski to bring their concerns to Cantore.

The timing and sequence of these events demonstrates that despite serious concerns, there was no rush to get Respondent in trouble. Instead, reasonable inquiry

---

[35] Respondent argues this is proof that she had Russo's permission to use the bathroom for Student A's time outs. This is discussed above.

was made in a reasonable period of time. It was only after the team meeting, when serious concerns still remained, that the concerns were brought to supervisors.

Nonetheless, Respondent takes issue with this. She views Ragona's and Ceileski's reporting as part of a conspiracy against her, including Russo and Natali lying to protect themselves, and Cantore lying to protect Russo, Natali and herself. Respondent also views said reporting and subsequent investigation as opportunity-taken to "get" Respondent, by Ragona, Ceileski and several others interviewed in the investigation whom Respondent believes had personal and/or professional motives to do so. Respondent singles-out Cantore as the main culprit, particularly as a consequence of the June 2014 meeting. Respondent's contention that "*[t]he June 2014 Meeting was the catalyst for everything that has happened since. (Weitzman2 5218.)*" [Respondent Brief 24] is not persuasive. The Hearing Officer has thoroughly considered these views of Respondent in light of the entire record and does not find them to be supported.

The record does not support Respondent's other defenses to her proven culpable conduct, including but not limited to: Respondent allegedly being disciplined for what other teachers have done without being disciplined, particularly with respect to time outs; retaliation for Respondent's allegations of inadequate staffing and/or training and District non-compliance; lack of support for the Bridge Program; lack of support for Respondent's classroom; and retaliation against Respondent for asserting the equal rights of her students.

Respondent asserts that Cantore wanted to shut down the Bridge Program, and further asserts that Cantore wanted to ensure that Respondent could not use her tenure

and seniority to remain employed by the District once the Bridge Program was shut down. "*Cantore did not want that, so these charges ensued. They are motivated by nothing other than a retaliatory motive that should not be countenanced.*" Respondent Brief 126-127. This is not persuasive.

It is undisputed that the Bridge Program had six (6) students in the 2012/2013 school year; five (5) students in the 2013/2014 school year; and three (3) students in the 2014/2015 school year. Natali testified credibly that there was concern about an insufficient number of students for the program. T4128-4131, 4188. Natali gave undisputed and unrebutted testimony that if the Bridge Program ended, Respondent had seniority to bump a less senior teacher. T4130-4131, 4188. Russo credibly denied that Cantore expressed to him that she no longer wanted the program. T949. The Bridge Program did indeed end after the 2014/2015 school year, but Respondent did not prove that it ended for nefarious reasons. Nor did Respondent prove that these charges were brought to ensure that Respondent could not use her tenure and seniority to remain employed by the District.



[redacted]

PENALTY

The District seeks the penalty of dismissal. Respondent strenuously disputes all the charges and seeks to retain her employment and resume her career with the District. Respondent alleges that the charges are frivolous, and seeks payment of her attorneys' fees pursuant to 3020-a. Respondent argues that "*Indeed, to the extent that the use of the bathroom is determined to be improper, which is specifically denied, Respondent should not be disciplined for its use.*" Respondent Brief 137. Respondent also argues that dismissal is not warranted because ". . . *none of the charges involve conduct by Respondent in which she was provided with a warning or proscription, and violated such warning or proscription.*" Respondent Brief 134. Respondent contends that dismissal is not appropriate for any of the charges, and ". . . *it is essential for the hearing officer to take into account the context in which the alleged conduct occurred. A teacher's conduct cannot be viewed in a vacuum, but must be viewed with an understanding of the circumstances surrounding the conduct.*" Respondent Brief 137.

The District proved that Respondent's culpable conduct constituted misconduct, neglect of duty, and conduct unbecoming a teacher. Respondent's proven culpable

conduct with respect to Charges 1 and 8 involved patterns of intentional, premeditated and ongoing acts of misconduct, neglect of duty, and conduct unbecoming a teacher.

Respondent intentionally, knowingly and materially misled colleagues, supervisors, subordinates and parents. Respondent never informed Student A's parents of *any* use of the bathroom for Student A, and never gave them any reason to believe there was a behavioral problem with their child. Respondent misled and failed to inform her supervisor, or any administrator, of her *actual* use of the bathroom for Student A. When she administered medication to Student E in school, Respondent stated to staff that she had permission from Student E's mother to do so, despite Respondent knowing full well that District policy prohibited her from administering medication to any student, with or without parental permission.

Respondent irreparably shattered the bonds of trust that are integral to employment as a teacher for the District. This is especially true for a special education teacher of undisputedly vulnerable, non-verbal, students with severe disabilities.

Respondent's claims of conspiracy and retaliation against her are not supported by the record. Respondent's blame of others, rather than taking responsibility for her own culpable conduct and poor judgment, is not supported by the record. Incredibly, Respondent, who was present at all 29 hearing days, and who was the last of 36 witnesses in this proceeding, testified that she had not heard any witness testify that the bathroom door was closed or that Student A was in the bathroom alone. As discussed above, the credible testimony of a number of witnesses contradicts Respondent's testimony.

Whether or not "*The District's policy regarding time out areas was muddled at best.*" (Respondent Brief 136), Respondent clearly violated the District's Code of Conduct despite undisputedly having notice of the Code. The record also demonstrates that Respondent knew or should have known that placing and confining a student alone in the classroom bathroom as a behavioral consequence was unauthorized and inappropriate, but she did so on multiple occasions, as part of her "isolation strategy". The record establishes that Respondent knew, and did not need to be "provided with a warning or proscription", not to do so.

Respondent testified, ***emphatically***, that she would repeat her conduct with respect to Charge 1 if returned to the classroom. Contrary to the overwhelming weight of the credible evidence, Respondent steadfastly testified that in her opinion, her use of the bathroom for time out was neither aversive nor dangerous. This demonstrates Respondent's poor judgment, and that Respondent continues to fail to comprehend the seriousness and inappropriateness of her proven culpable conduct.

Respondent's testimony, and the record as a whole, establish that a penalty less than dismissal would not deter her from engaging in the same Charge 1 conduct. Furthermore, they establish that such culpable conduct is highly likely – almost certain, in view of Respondent's emphatic testimony – to recur. Consequently, despite Respondent's previously unblemished record, a penalty less than dismissal would be ineffective, unwarranted, and would unacceptably endanger the health, safety and welfare of the District's students.

With respect to Charge 3, Respondent's proven culpable conduct involved her

use of unreasonable, unnecessary, and excessive physical force to unnecessarily push Student B eight (8) feet across a hallway and forcefully into contact with the opposite hallway wall. This charge involved only one (1) particular incident. However, it is concerning that there was absolutely no need nor valid reason for this conduct. Respondent had already properly applied physical force to prevent the student from pulling the fire alarm. The incident could have and should have been over, but Respondent lost her self-control with a special education student whose actions posed no physical threat to Respondent or anyone else. The facts and circumstances of this record give reasonable cause to believe it is not unlikely that Respondent would act in a similar manner if in the same situation. The record establishes that Respondent knew, and did not need to be "provided with a warning or proscription", not to use unreasonable, unnecessary, and excessive physical force upon a student, but she did so.

With respect to Charge 8, the record establishes that Respondent knew, and did not need to be "provided with a warning or proscription", not to administer medication to a student in school, but she did so on multiple occasions.

With respect to Charges 1, 3 and 8, Respondent's proven culpable conduct in this record was clearly, and self-evidently, improper and unacceptable misconduct, neglect of duty, and conduct unbecoming a teacher. Although the applicable burden of proof is preponderance of the evidence, the record evidence is compelling.

Teaching the Bridge Program was undoubtedly difficult and demanding duty. In reaching the determination of appropriate penalty, this was given full consideration, as was Respondent's unblemished disciplinary history with the District for seven (7)

years, her favorable annual performance evaluations, and the *many* credible and undisputed positive testimonies, recitations and references to Respondent's skills and dedication in the record.

Nevertheless, the District proved just cause to dismiss Respondent. Respondent's proven culpable conduct is more than sufficient to justify and warrant dismissal, even for a first offense. Respondent's proven culpable conduct in this record improperly and unacceptably endangered the health, safety and welfare of the District's students.

The record adduced in this extensive proceeding leaves the Hearing Officer with no choice but to agree with the District's assertions that it cannot trust Respondent as a teacher of its students, and that dismissal is the only appropriate penalty under New York State Education Law § 3020-a.

Based upon all of the foregoing, and in view of the entire record, the District's request for the penalty of dismissal is reasonable, and for just cause. It is not disproportionate, unwarranted, arbitrary, capricious or an abuse of discretion.

Upon careful review and consideration of the entire record, including all mitigating factors therein, the Hearing Officer issues the following Award pursuant to New York State Education Law § 3020-a(4)(a):

[Remainder of this page intentionally blank]

AWARD

1. Respondent is proven guilty of misconduct, neglect of duty, and conduct unbecoming a teacher, for her culpable conduct as to Charges 1, 3, and 8.

[redacted]

3. Accordingly, the District has just cause to discipline Respondent for Charges 1, 3, and 8.

4. The charges are not frivolous.

5. Based upon all of the foregoing, and in view of the entire record, the District's request for the penalty of dismissal is reasonable and for just cause. It is not disproportionate, unwarranted, arbitrary, capricious or an abuse of discretion.

6. Pursuant to New York State Education Law § 3020-a(4)(a), and for the reasons set forth in the Opinion, the penalty is dismissal.

Dated: March 31, 2019

ROBERT A. GREY, ESQ.
HEARING OFFICER

STATE OF NEW YORK)
) ss.:
COUNTY OF SUFFOLK)

I, ROBERT A. GREY, ESQ., do hereby affirm that I am the individual who executed this instrument, which is my Opinion and Award.

Dated: March 31, 2019

ROBERT A. GREY, ESQ.
HEARING OFFICER